Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Seth Bader, *Petitioner*

v.

State of New Hampshire, *Respondent*

On Petition for Writ of Certiorari
To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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10 pp

Questions Presented

I. Should certiorari be granted where a state supreme court has held that a judge who recused himself from a case following an exchange of criticism with a litigant may preside over another case involving the same litigant?

II. Should certiorari be granted where a state supreme court found no violation of the Confrontation Clause in a trial where a jury repeatedly heard inculpatory statements from an unavailable declarant?

III. Should certiorari be granted where a state supreme court held that jurors who asked to speak to the trial judge about coercive behavior by the jury foreperson need not be voir dired?

IV. Should certiorari be granted where a state supreme court held that no evidentiary hearing is required as to a recantation of perjured testimony by a prosecution witness?

List of Parties

The petitioner is Seth Bader, an inmate at the N.H. State Prison for Men, P.O. Box 14, Concord, N.H. 03302-0014.

The petitioner is represented by Attorney Paul J. Haley 460 W. Main Street, P.O. Box 1868, Hillsboro, NH 03244. Telephone (603) 478-7878.

The respondent is the N.H. Attorney General's Office, 33 Capitol Street, Concord, N.H. 03301-6397. Telephone (603) 271-3671.

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State v. Seth Bader, _____N.H. _____, _____ A.2d _____, slip opinion no. 98-472 of September 13, 2002, motion to reconsider denied on October 18, 2002.

Statement of Jurisdiction

This is a petition for a writ of certiorari directed to a state's highest court within 90 days of that court's denial of a motion to reconsider an appeal that raised federal issues. The United States Supreme Court has jurisdiction to grant this writ of certiorari under 28 U.S. Code §1257, and this petition is timely under 28 U.S. Code §§2101 and 2104.

Constitutional Provisions

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to ... a ... trial, by an impartial jury ... and ...to be confronted with the witnesses against him..."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTION ONE

" ...nor shall any State deprive any person of ... liberty ...without due process of law..."

Statement of the Case

PROCEDURAL HISTORY

The petitioner was convicted of first degree murder and of conspiracy to commit murder in state superior court following a jury trial. A sentence of life imprisonment without the possibility of parole was imposed. A direct appeal was timely filed in and accepted by the state supreme court. That appeal was stayed to allow litigation of a motion for new trial in the superior court. The denial of that motion was also timely appealed. The direct appeal and the appeal from the new trial motion were consolidated. After briefing and oral argument, the state supreme court affirmed the conviction. A timely motion to reconsider was denied. The state supreme court noted in its opinion that the petitioner had presented federal questions as to all of the issues presented herein. This petition ensues.

FACTS AS TO JUDICIAL RECUSAL ISSUE

In April of 1997, the petitioner was arrested for first-degree murder and for conspiracy to murder his ex-wife, Vicki Bader. At the same time, Vicki's estate commenced a civil action against the petitioner for wrongful death. On the morning of the first business day after the petitioner's arrest, the estate obtained an *ex parte* attachment against the petitioner's entire net worth. The attachment papers explicitly stated that the attachment was intended to prevent the petitioner from retaining criminal counsel, and that the only evidentiary basis for this attachment was the bare fact of the petitioner's arrest. Judge Walter Murphy of Rockingham Superior Court granted this *ex parte* attachment. He was later assigned to preside over the criminal matter as well. During that spring, Judge Murphy presided over a bail hearing in the criminal matter. At the state's request, he quashed the petitioner's subpoenas for putative prosecution witnesses; the petitioner had sought to examine them at the bail hearing to show that the state's case was so weak that very low bail was

warranted. Judge Murphy then set bail at an amount that the petitioner could have met but for the *ex parte* attachment.

In September, 1997, the petitioner sought a writ of habeas corpus from the state supreme court to challenge the bail order. In that petition, the petitioner used the words "chimera" and "empty exercise" to describe Judge Murphy's handling of the early stages of the case. In effect, the petitioner accused Judge Murphy of conducting a sham proceeding with a pre-determined outcome in a high-profile case.

In November of 1997, Judge Murphy recused himself from the civil case, but remained on the criminal case. At a December 4, 1997 motion hearing in the criminal case, the following occurred at Transcript 12/4/97, page 8, lines 4-7:

> THE COURT: - recused myself from the consideration of [the civil case] because of a writ of habeas corpus that was filed on your behalf, which I thought contained all kinds of misstatements.

Judge Murphy never explained why objectionable statements in the criminal case would be cause for him to recuse himself not from that case but only from the related civil case.

The petitioner later argued before both the superior court and the state supreme court that once Judge Murphy had recused himself from one of the petitioner's cases, due process required that he be recused from all of the petitioner's cases. The state courts rejected this argument. The state supreme court noted in its ruling that the petitioner had presented a federal argument on this issue, but the state supreme court declined to decide it, on the ground that state law was more protective of the petitioner's rights than was federal law.

FACTS AS TO CONFRONTATION CLAUSE ISSUE

Intent to kill is an element of both the first-degree murder indictment and the murder conspiracy indictments against the petitioner. At trial, the state sought to prove that element

of the indictments through the testimony of Vicki's physician, Dr. James Fieseher (pronounced "Fisher") about a conversation between himself and Vicki that supposedly occurred during a routine physical examination over a year prior to her death. Dr. Fieseher had advised Vicki to relieve her high blood pressure by losing weight; she allegedly refused to do so because she feared being murdered and wanted to make her body hard to move. The trial testimony about that conversation was as follows:

> DR. FEISEHER:...she really thought that, frankly, that she was going to die...
>
> PROSECUTOR: Did she tell you how she thought she was going to die?
>
> DR. FEISEHER: No. But she thought her ex-husband was going to kill her.
>
> DEFENSE COUNSEL: Objection, your honor.
>
> THE COURT: I'm going to sustain that objection and ask the jury to disregard it.

The above exchange occurred on April 1, 1998, at Trial Transcript, Day 5, page 36, line 20, to page 37, line 4. That same day, at page 39, lines 1-5, the prosecutor offered an argument at a bench conference for the relevance of the doctor's account of Vicki's supposed statements:

> PROSECUTOR: ...what it goes to prove in this case is it proves intent and motive...his intent and motive to kill her.

Immediately after the bench conference, the state returned to the same topic, at page 39, line 22, to page 40, line 23:

> DR. FIESEHER:...she had, in her own mind, envisioned her ex-husband trying to move her - her body.

DEFENSE COUNSEL: Your Honor, I'm going to object.

THE COURT: Sustained.

DEFENSE COUNSEL: I'd ask that this be stricken.

THE COURT: The jury -the jury's instructed to disregard that last remark as not responsive.

PROSECUTOR: Was she joking when she said it to you, as far as you could tell?

DEFENSE COUNSEL: Your Honor, could we approach on this?

THE COURT: I'll sustain the objection...

DEFENSE COUNSEL: Thank you.

THE COURT:...if that's what you want me to do.

PROSECUTOR: Based on your observation of her demeanor, did she appear to be joking to you?

DEFENSE COUNSEL: Your Honor, same objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Thank you.

PROSECUTOR: And when was the statement made about making the body difficult to move?

DEFENSE COUNSEL: Your Honor, same objection. It's going back to the same objectionable material.

THE COURT: Overruled.

PROSECUTOR: When did she say this to you?

DR. FEISEHER: In July of 1995. (13 months prior to her August 1996 murder.)

Later that same day, Dr. Feiseher was cross examined by defense counsel. Relevant portions of that cross examination, from Trial Transcript, Day 5, page 45, line 23, to page 46, line 7, are as follows:

DEFENSE COUNSEL: Did you know that she was hospitalized seven times for psychiatric problems.

DR. FEISEHER: I—I did not know that.

DEFENSE COUNSEL: So she hid four admissions from you, were you aware of that?

DR. FEISEHER: Well, apparently not.

DEFENSE COUNSEL: She wasn't being entirely candid and frank with you when she was going over her history with you, was she?

DR. FEISEHER: No.

In short, when Vicki's doctor told her to lose weight, she supposedly replied that she wanted to remain obese so as to foil the petitioner's plot to murder her by making her body difficult to move. She was speaking over a year before her death, and she made no allegation that the petitioner had ever attempted or even threatened to murder her. The state sought to use this fortune-telling hearsay from an unavailable and mentally ill declarant to prove an element of the indictments.

The state supreme court noted in its ruling that the petitioner had raised the Confrontation Clause as an argument against the propriety of this testimony. That court found that the testimony had been rendered harmless by the trial court's instructions to the jury to disregard some (although not all) of it.

FACTS AS TO JUROR ISSUE

There was a long jury deliberation in this matter. On Thursday, May 7, 1998, the jury was several days into that deliberation. On that day, there was a chambers conference at which the following occurred:

BAILIFF KROOK:...they wanted to see the Judge... the jurors was extremely upset and almost to the point of

tears. And they were insistent about wanting to see the judge and talk about that they couldn't get it across to the foreperson, that they couldn't get her to agree about them wanting to get their questions, she wouldn't accept their questions. (Transcript 5/7/98, page 3, lines 10-17.)

BAILIFF DALEY:...I was approached by [two jurors] ...where they reported to me...a conflict with the jury foreperson. They had a question and they wanted to submit it to the judge, but she wouldn't do it...[one juror] appeared very upset, near tears. (Id. at p.5, line 17-p.6, line 2.)

THE COURT:...the jurors themselves have requested that they speak to the court... (Id. at p.10, lines 2-3.)

THE COURT: The only issue left is whether or not... to question the jurors...[eight minute recess] I am going to decline to talk to the two jurors. (Id. at p.13, lines 11-22.)

It was never learned what questions those two jurors wanted answered, why the foreperson did not want those questions to reach the court, or how the foreperson prevented the two jurors from conveying their questions directly to the bailiffs.

At least one question from jurors did reach the court. The following also occurred at the May 7, 1998 chambers conference:

THE COURT: "The jury would like to know, if we have reached a verdict on one of the two charges, do we need to inform you of that fact, or do we wait until we have a decision on both charges?" (Id. at p.5, lines 2-5.)

DEFENSE COUNSEL: I think perhaps you should say, "If you are unable to reach a verdict on both charges, let the court know." (Id. at p.15, lines 20-22.)

THE COURT: "Continue your deliberations until both verdicts have been determined." (Id. at p.16, lines 14-5.)

The next day, Friday, May 8, 1998, the twenty-first day of the trial, there was a jury verdict of "guilty" on both charges. The following occurred that day, at Trial Transcript, Day 21, page 7, line 12 to page 8, line 13:

DEFENSE COUNSEL: Your Honor, at this time, we would ask for individual voir dire of [the two jurors]...It was clear that one of those two jurors was in tears as she left the court today. That's a juror who asked the bailiff to notify the court that she wished to speak to the court earlier.

THE COURT: All right. The defendant's motion is denied.

The state supreme court noted in its ruling that the petitioner had alleged a violation of the Jury Trial Clause. That court found, on these facts, no violation of the petitioner's right to the uncoerced verdict of twelve impartial jurors.

FACTS AS TO RECANTED PERJURY ISSUE

The evidence presented at trial included no physical evidence linking the petitioner to his ex-wife's murder, no confessions or admissions by the petitioner, and no testimony by uninvolved eyewitnesses to any aspect of the murder. The state's case rested upon the testimony of two alleged accomplices. These were Joseph Bader, a relative of the petitioner, and Sandro Stuto, an acquaintance of the petitioner's then fiancé. Trial testimony showed that both of them had received substantial leniency from the state and that both of them had made changes in their stories to fit the state's theory of the case. The state, in both its opening and its closing, urged the jurors to rely on Stuto's testimony to overcome reasonable

doubt. The state, in its closing, also vouched for the truth of Stuto's testimony.

After the trial, a new witness, "John Doe", became known. He is referred to by a pseudonym for his safety, as he is currently a prison inmate. His true name is known to the state. He has made a statement that he was a cellmate of Stuto's and that Stuto recanted his trial testimony and offered a completely different story about the murder - one which wholly exculpated the petitioner of his ex-wife's murder. On May 21, 2001, "Doe" submitted to a polygraph examination and simultaneously made a videotaped statement, which was subsequently transcribed and placed before the state supreme court. That transcript, at page 19, lines 3-6, contains the following:

> POLYGRAPH EXAMINER: Okay. Did Sandro Stuto tell you that he lied during the trial and that it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?
>
> DOE: Yes.

Counsel for the state has adamantly refused to take part in listening to or following up on "Doe's information. The state superior court declined to grant a new trial or even to hold an evidentiary hearing on the new trial motion. In effect, the superior court adopted the state's position, repeatedly expressed in its pleadings, that the state has not the slightest obligation to investigate whether "Doe" is telling the truth about Stuto's recantation of his perjured trial testimony. The state supreme court noted in its ruling that the petitioner had alleged a violation of the Due Process Clause in the denial of an evidentiary hearing as to the recantation. That court found on these facts no denial of due process.

Reasons for Granting the Writ

I. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HAS HELD THAT A JUDGE WHO RECUSED HIMSELF FROM A CASE FOLLOWING AN EXCHANGE OF CRITICISM WITH A LITIGANT MAY PRESIDE OVER ANOTHER CASE INVOLVING THE SAME LITIGANT.

The petitioner asks this Court to hold that once a judge is recused from a case involving a particular litigant, he is always recused from cases involving that litigant. Such a holding would be consistent with this Court's judicial recusal jurisprudence and would resolve a split between the New Hampshire Supreme Court and the United States Court of Appeals for the First Circuit.

In the instant case, the New Hampshire Supreme Court held that a judge who recused himself from a case following an exchange of criticism with a litigant could still preside over another case, contemporaneous and factually related, involving the same litigant. That court based its holding on its opinion that the judge in question need not have recused himself from the first case. But that opinion begs the question of whether the bare fact that the judge had recused himself, necessarily or not, created an appearance of bias and hence a due process violation if that judge had any further involvement with the litigant. The state supreme court's holding does not mesh with the basic principles of this Court's holdings on judicial impartiality and is contrary to the holding of apparently the only United States Court of Appeals to address a similar -although not identical -fact pattern.

This Court long ago held that constitutional due process requires unbiased judges in all state and federal proceedings. Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972), In re Murchison, 349 U.S. 133, 136 (1955), Tumey v. Ohio, 273 U.S. 510, 523 (1927).

It is also well settled that due process is violated by an appearance of judicial bias, even if the judge in question does not consider himself biased. Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 859-61 (1988), In re Murchison, supra, Liteky v. U.S., 510 U.S. 540, 548 (1994).

Judicial opinions originating in the courtroom are not usually grounds for recusal, but may be such in extreme circumstances. Liteky v. U.S., 510 U.S. at 551.

The failure of a judge to recuse himself where recusal is warranted is always reversible error, regardless of whether any particular "harm to a litigant can be shown; harmless error analysis does not apply to judicial bias. Chapman v. California, 386 U.S. 18, 23 (1967), Tumey v. Ohio, supra.

In El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136 (lst Cir. 1994), the First Circuit held that where a judge has recused himself from a case, he can take no further action on that case except to transfer it to another judge; in particular, such a judge cannot even reconsider his own recusal if he determines that it was unnecessary. This is in accordance with the doctrine that even the appearance of judicial bias is a due process violation; it would occasion such an appearance if a judge who at one point held himself out to the world as recusal-worthy had any further involvement with the case.

However, recusal is ultimately based not on possible bias against a case but on possible bias against the parties to the case. Thus, once a judge -however mistakenly - determines that he cannot preside over a case because of something a litigant said, he ought not to preside over another case involving the same litigant. This is especially so where the two cases involve a shared fact pattern and are contemporaneous, and where the decision in one case will ultimately decide the key issue in both cases. That was the situation here, where the trial judge recused himself from a civil action for wrongful death but continued to preside over the underlying murder trial. Certiorari should be granted here to clarify that once a judge is recused he is always recused, thus re-

solving a split on this issue between the N.H. Supreme Court and the First Circuit.

II. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT FOUND NO VIOLATION OF THE CONFRONTATION CLAUSE IN A TRIAL WHERE A JURY REPEATEDLY HEARD INCULPATORY STATEMENTS FROM AN UNAVAILABLE DECLARANT.

The petitioner asks this Court to hold that testimony which would not be admissible directly from a declarant cannot be introduced via hearsay from an unavailable declarant to accuse a criminal defendant of an element of the indictments against him. The state-court error of law in allowing such non-cross-examined testimony to be admitted into evidence contradicts this Court's well-settled precedents and should be reversed.

In the instant case, the New Hampshire Supreme Court found no violation of the Confrontation Clause where the petitioner was accused of an element of the indictments against him by an unavailable declarant who was engaging in fortune-telling as to an event that had not yet occurred. Specifically, the state court found no error where a jury was told to disregard some but not all of the statements allegedly made by the victim, the petitioner's ex-wife Vicki, accusing the petitioner of intending to harm her by unspecified means at an unspecified future time, where those statements had been told to the jury by Vicki's physician under the medical diagnosis hearsay exception. No allegations of violent behavior or even of threats of violence by the petitioner were made by Vicki to her physician. Had Vicki herself taken the stand, she would not have been allowed to speculate that someone intended to kill her by unknown means at an unknown future time. But Vicki's physician was allowed to offer just such testimony, from a declarant who was unavailable for cross examination, thus providing the state with the element of intent in the indictments. The state elicited testi-

mony from Vicki's physician that he had advised Vicki to relieve her high blood pressure by losing weight. This testimony was admitted under the medical diagnosis hearsay exception. The physician went on to testify that Vicki rejected his advice about losing weight on the ground that she believed that the petitioner planned to murder her and that she wanted to foil the plot by remaining obese, thus making her body difficult to dispose of. The first time the state elicited this testimony, the petitioner objected; the trial court sustained the objection and ordered the jury to disregard the testimony. The state then proceeded to elicit the same testimony three more times within a very few minutes, covered in four transcript pages. Each time the trial court sustained an objection and ordered the jury to disregard the testimony. The state then asked the physician the time" frame of these statements, which was over a year before Vicki's death. The petitioner's objection to that testimony was overruled. Thus, the jury was told the time frame of a conversation that it had just been told four times to disregard. Telling the jury the time frame of a conversation that it had been instructed to disregard necessarily put that conversation itself back into evidence. The state argued at a bench conference that this testimony was relevant to establish the petitioner's intent to kill his ex-wife Vicki. On cross-examination, it was shown that Vicki had both a severe psychiatric history and a history of lying to her physician. The net result of this testimony was that the petitioner was completely deprived of his right to cross examine a mentally ill declarant as to her fortune-telling which had accused the petitioner of an element of the gravest of criminal charges.

"A complete denial of cross-examination constitutes constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966). The curative jury instruction was useless to unring the bell the state had rung to establish intent. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers

know to be unmitigated fiction." Krulewitch v. U.S., 336 U.S. 440, 453 (1949). The bare fact that the petitioner was accused of an element of the indictments by a declarant unavailable for cross-examination is enough to completely undermine the petitioner's conviction. Vicki Bader, speaking through the mouth of her physician, could not be disregarded by the jurors, in spite of an instruction to do so, for two reasons. First, the jury was allowed to hear testimony as to the time frame of the statements that they had been told four times to disregard. As discussed above, they could only have taken the time frame testimony as reviving the prior testimony and superseding the instructions to disregard that testimony. Second, this Court has held that jury instructions are ineffective as a matter of law to cure a jury's exposure to inculpatory statements from a co-defendant who is unavailable for cross examination, Bruton v. U.S., 391 U.S. 123, 136 (1968), or to cure a jury's exposure to a coerced confession, Jackson v. Denno, 378 U.S. 368, (1964). The circumstances of this case show that a hearsay exception was used to admit testimony of such low reliability - fortune-telling- that it would not be admissible even if the declarant had been available for cross-examination. The combination of unreliable testimony and an unavailable declarant add up to a structural error in the instant case.

"A state determination may be set aside...if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing principle to a context in which the principle should have controlled." Ramdass v. Angelone, 530 U.S. 156, 166 (2000). That is precisely what happened here -the state supreme court refused to apply the principles of Brookhart, Krulewitch, Bruton, and Jackson to a recognizable variant fact pattern where an accusing declarant was unavailable for cross examination.

This Court has held that the admissibility of hearsay evidence under the Confrontation Clause must depend on the evidence's inherent reliability and cannot be determined with reference to other evidence adduced at trial. Lilly v. Virginia,

527 U.S. 116, 138-9 (1999). Thus, the state cannot use its theory that the petitioner is to blame for Vicki's unavailability to justify admitting evidence to prove that theory or to admit fortune-telling as to events months or years in the future to prove an element of its indictments.

This issue breaks little new ground in the law. Rather, it is a case where a state court has decided an issue in a way that conflicts with this Court's well-settled precedents. In Lilly, this Court vacated a Virginia murder conviction because a state court had disregarded the well-settled Bruton rule. For much the same reason, certiorari should be granted here.

III. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HELD THAT JURORS WHO ASKED TO SPEAK TO THE TRIAL COURT ABOUT COERCIVE BEHAVIOR BY THE JURY FOREPERSON NEED NOT BE VOIR DIRED.

The petitioner asks this Court to reaffirm its holding that an accused's allegation of either an extrinsic or an intrinsic juror incident requires the trial judge to voir dire the jurors involved on the record in order for the trial court's findings about the incident to receive any deference on appeal. A state supreme court has made a holding on that issue in this case which is diametrically opposed to the precedent of this Court, the precedent of the United states Courts of Appeal, and even to the state court's own precedent. The state court's error of law in upsetting such well-settled precedent and thus creating a split between itself and virtually every other court to consider this issue should be reversed.

In the instant case, the N.H. Supreme Court made the following holding as to a situation where the petitioner supported the request of two jurors to be voir dired concerning the jury foreperson's interference with their submission of questions:

"[Where a] defendant has made no claim of extrinsic contact...[but] the defendant has alleged that intra-jury misconduct prejudiced his right to a fair trial...[he] has the burden of proving actual prejudice...Absent proof of actual prejudice, it was within the trial court's discretion to determine the nature and extent of its inquiry into the situation...[this is a] fact-specific determination...the decision not to conduct individual juror voir dire [is discretionary] [internal citations omitted]"

State v. Seth Bader, ___N.H.____ slip opinion no. 98-472, September 2002. That court went on to hold that whatever problem had existed amongst the jurors had been resolved when the trial judge instructed them that they must continue to deliberate until they reached a verdict on both counts of an indictment rather than just one count.

The fatal flaw in the state supreme court's holding may be seen when it is contrasted to this Court's leading recent holding oil juror incidents. In Smith v. Phillips, 455 U.S. 209, 215-6 (1982), this Court said:

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. For example, in Remmer v. U.S., [citation omitted] a juror was approached by someone...the [U.S. Supreme] Court instructed the trial judge to determine the circumstances, the impact thereof upon the juror, and whether or not they were prejudicial, in a hearing with all parties permitted to participate. [internal quotation marks omitted]".

The Smith Court went on to hold that a trial court's fact-finding as to a juror incident is entitled to a presumption of correctness, if the jurors involved were voir dired on the record, 455 U.S. at 217. Also in Smith, 455 U.S. at 221-2, Justice O'Connor stated as follows in her concurrence:

"Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of juror bias arises from juror misconduct, and not simply from attempts of third parties to inf1uence a juror ."

Curiously, only a year prior to its decision in the instant case, the N.H. Supreme Court applied a rule of law that was a correct gloss on Smith. In State v. Bathalon, 146 N.H. 485 (2001) , that court said,

"When confronted with an allegation of improper intrajury conduct, especially where it is alleged that a juror improperly concluded guilt or innocence...the trial court should generally remove the offending juror from the panel and undertake individual voir dire..."

The position that the N.H. Supreme Court adopted in Bathalon and abandoned in the instant case is consistent with this Court's requirement for on-the-record voir dire as to juror incidents. Any other position simultaneously places the burden of proof of prejudice on an accused and deprives him of the means of meeting that burden of proof, thus violating due process through that Kafka-esque result.

"There is a kaleidoscopic variety of possible problems" with a jury that can arise during the course of a trial." U.S. v. Gaston-Brito, 64 F.3d 11, 12 (1st Cir. 1995) (internal quotation marks and citations omitted). Thus, the specific incidents that occurred in the cases discussed herein are presumably examples but not limits of when a trial judge should conduct mid-trial voir dire. The failure of a trial court to voir dire jurors as to an incident may result in a record that is too opaque to be untangled on appeal. Concerning such a sce-

nario, one United States Court of Appeals held in U.S. v. Resko, 3 F.3d 684 (3d Cir. 1993):

> "...where the jury misconduct was discovered mid-trial but there is no way for [an appeals court] to determine whether or not the defendants were prejudiced, we reverse and remand for a new trial, even though the defendants have not established prejudice...the [trial] court erred be declining to engage in...individualized voir dire... By failing to do so, the [trial] court allowed the jurors, in effect, to be the judges of whether or not they had been influenced...Given the importance of the Sixth Amendment rights at stake and the relative ease with which the [trial] court could have properly assessed the misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice ."

Finally, in U.S. v. Jenkins, 380 U.S. 445 (1965), this Court vacated a conviction and remanded the case for anew trial where a trial judge had told a jury that it must continue deliberating until it had a verdict on both counts of a two-count indictment; the jury had sent the judge a note saying it had a verdict on only one count. The apparent ratio decidendi of Jenkins is that a trial judge must not become an unwitting accomplice in the possible coercion of holdout jurors by a majority.

In short, this Court has held that (a) a criminal defendant's allegation of a possibly prejudicial juror incident triggers mandatory on-the-record voir dire, (b) extrinsic and intrinsic juror incidents both fall within this rule, (c) that a trial judge's findings following such voir dire are entitled to deference on appeal, and (d) a trial judge must not tell a jury that has a verdict on only one count to continue deliberating until it has a verdict on all counts.

However, the N.H. Supreme Court made diametrically opposite holdings on each of the above four points, that (a) a defendant must prove actual prejudice due to a juror incident

before he can get a hearing to look into whether such proof exists. (b) intrinsic jury incidents are less worthy of investigation than are extrinsic jury incidents, (c) a trial judge's findings as to whether a jury incident occurred and whether it prejudiced the jurors are entitled to deference on appeal absent voir dire, and (d) a trial judge's jury instruction to keep deliberating until a verdict is reached on all counts is proof positive that the judge has appropriately resolved an intrinsic jury incident. In addition to squarely contradicting long-existing federal case law, the state court's holding is an example of circular reasoning; the state court will not allow a hearing into juror prejudice absent pre-existing proof of such prejudice, but will allow such a hearing where it is redundant because the proof of prejudice is already in hand.

As with the Confrontation Clause issue discussed in the previous section of this petition, this issue breaks little new ground in the law. Rather, it is a situation where a state court has decided an issue in a way that conflicts with this Court's well-settled precedents. Therefore, certiorari should be granted here.

IV. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HELD THAT NO EVIDENTIARY HEARING IS REQUIRED AS TO A RECANTATION OF PERJURED TESTIMONY BY A PROSECUTION WITNESS.

The petitioner asks this Court to hold that an evidentiary hearing is required by due process when evidence of a prosecution witness having committed and recanted perjury surfaces after trial. There is a split amongst the U.S. Courts of Appeals on this issue. This issue will decide the rest of the petitioner's life and is a situation that recurs frequently in jurisdictions throughout the United States.

In the instant case, the New Hampshire Supreme Court held that no evidentiary hearing is required on a motion for a new trial where a state's witness has entirely recanted his trial testimony and made a new statement to a third party com-

pletely exculpating the petitioner, in a case that rested entirely upon the uncorroborated testimony of alleged accomplices. That holding was based upon the state supreme court's opinion that due process is not violated where the state did not suborn perjury by its witness, but where that witness's perjury became apparent after trial.

This Court's foundational case on prosecution witness perjury is Napue v. Illinois, 360 U.S. 264, 269 (1959). Napue requires a new trial if either prong of a two-prong test is triggered. The first prong is where the state suborns perjury. The second prong is failure to correct perjury where it appears without having been solicited. The New Hampshire Supreme Court implicitly held that only the first prong of Napue is good law and that the second prong is mere dicta. However, that holding is contrary to the plain words of the Napue Court, as follows:

> "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment... The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears...It is of no consequence that the falsehood bore upon the witness's credibility rather than the defendant's guilt." (Internal citations omitted.)

In the instant case, the recantation of perjury by a prosecution witness went directly to the petitioner's guilt or innocence. The Napue Court went on to say that the fact that the prosecution witness in question was impeached on other grounds does not turn a tainted trial into a fair one, and that the question of whether there was a violation of due process as a result of perjured testimony is reviewed de novo on appeal. Id., 360 U.S. at 270-1.

The history of the second prong of Napue and the way that various courts have treated it merits consideration. The petitioner submits that the genesis of the second prong of Napue is to be found in a four-justice dissent pre-dating Napue by three years. In Durley v. Mayo, 351 U.S. 277 (1956), petitioner Durley was serving a thirty year sentence at the Florida state prison for theft of livestock (by contrast, the petitioner in the instant case is serving a life sentence without possibility of parole). His conviction, like the petitioner's, rested upon uncorroborated accomplice testimony. After his trial, prosecution witnesses recanted and admitted that they had born false witness against an entirely innocent man. Durley commenced litigation in the Florida courts to vacate his conviction. Durley made procedural errors in his pro se litigation, and the Florida Supreme Court declined relief on procedural grounds.

When Durley's petition reached this Court, five justices felt that they were barred by the procedural default from reaching the merits of the case. Four justices joined in a dissent; they felt that a shocking miscarriage of justice was being swept under the rug. Specifically, they asserted that due process requires an evidentiary hearing where a prosecution witness, after trial, recants perjured testimony. Durley, 351 U.S. at 290.

Three years after Durley, this Court unanimously announced the Napue decision, which was written by one of the Durley dissenters. It may be inferred that the second prong of Napue was intended to address the Durley horror—unconscionable state inaction in the face of recanted perjury.

Willful state blindness as to prosecution witness perjury was also the subject of Chambers v. Mississippi, 410 U.S. 284, 299-302 (1973), fourteen years after Napue. In Chambers, this Court struck down a state rule of evidence that rendered inadmissible a third party's account of a prosecution witness's recantation of perjury. Recently, this Court has described the pre-Chambers state of the law as a "barbarous doctrine". Lilly v. Virginia, 527 U.S. 116, 127-130 (1999). Thus, this Court has

repeatedly had to address the chronic unwillingness of states to face up to miscarriages of justice through prosecution witness perjury.

The government is barred from accomplishing indirectly what it cannot do directly. Rutan v. Republican Party of Ill., 497 U.S. 62, 77-78 (1990) (First Amendment issue). Thus, this Court should now hold that states can no more sustain a conviction through willful blindness as to recantations of perjury than they can obtain a conviction through subornation of perjury. Such a holding will resolve a split in the circuits on this issue.

Three circuits have held that due process requires an evidentiary hearing as to a recantation of non-suborned perjury by a prosecution witness. Sanders v. Sullivan, 863 F.2d 218, 225 (2d Cir. 1988), Cornell v. Nix, 921 F.2d 769, 771 (2d Cir. 1990), cert. den. 507 U.S. 1020, Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991), U.S. v. Page, 828 F.2d 1476, 1478 (10th Cir. 1987), cert. den. 484 U.S. 989.

All three of the above circuits have also held that prosecutorial use of perjury that is not knowing but is reckless, or prosecutorial use of perjury that the prosecutor did not know of but should have, is analytically indistinguishable from prosecutorial subornation of perjury. U.S. v. Torres, 128 F.3d 38, 49 (2d Cir. 1997), cert. den. 5'23 U.S. 1065, U.S. v. Tierney, 947 F.2d 854, 860-1 (8th Cir. 1991), U.S. v. Sinclair, 109 F.3d 1527, 1532 (10th Cir. 1997). The First Circuit has discussed the possibility that it would adopt the Torres/Tierney/Sinclair doctrine if an appropriate case presented itself. U.S. v. Gonzalez-Gonzalez, 258 F.3d 16, 21 (1st Cir. 2001), U.S. v. Huddleston, 194 F.3d 214, 221 (1st Cir. 1999). This line of cases is consistent with the doctrine that a prosecutor should seek justice, not merely victory. U.S. v. Doe, 860 F.2d 488, 494 (1st Cir. 1988). Thus, it is both unseemly and unconstitutional for a state to refuse to air out at an evidentiary hearing post-trial indications that a prosecution witness is a perjurer.

However, several of the circuits have held that no action is required as to post-trial evidence of prosecution witness

perjury. Those circuits have all held that Napue only applies to prosecutorial subornation of perjury. Smith v. Black, 904 F.2d 950 (5th Cir. 1990), Reddick v. Haws, 120 F.3d 714 (7th Cir. 1997), Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992). Each of those cases explicitly rejects the Second Circuit's holding in Sanders v. Sullivan, supra.

Thus, on this issue, there is a split in the circuits and a split between the New Hampshire Supreme Court and several of the circuits as to whether due process requires an evidentiary hearing where evidence of a recantation of prosecution witness perjury surfaces after trial. It is better public policy to require such a hearing. The cost of a hearing is minimal. If the hearing establishes that a new trial is required due to prosecution witness perjury, there is no harm to the prosecution, because there is no legitimate governmental interest in sustaining a conviction which rests upon false evidence. On the other hand, if such a hearing is refused, a double miscarriage of justice -a false conviction (and, in the instant case, a life sentence without parole) and unpunished perjury -will forever go unremedied. Certiorari should be granted to resolve this fundamental issue.

Prayers For Relief

WHEREFORE, for all the above reasons, this Honorable Court should grant a writ of certiorari directed to the New Hampshire Supreme Court.

Respectfully Submitted,
Seth Bader, Petitioner,
by his Attorney

s/

B. Michael Cormier
86 Summer Street
Haverhill, MA 01830
978-374-0924

3-19-03
Date

civil matter because I've –

MR. BADER: I'm trying not to. I'll move into my next point.

THE COURT: -- recused myself from the consideration of that because of a writ of habeas corpus that was filed on your behalf, which I thought contained all kinds of misstatements.

MR. BADER: Let me move on to the next issue, I'll drop the business about the Swiss buyer. I think I made my point. A few times Mr. Twomey has kind of half jokingly suggested to me is the thing to do is sell the violin for just enough to pay their bill. Now admittedly, he said it in a joking way. He said it a lot of times. It had a bit of an edge to it, and it troubled me. So I retained separate counsel to represent me with regard to the violin. That's not civil counsel from New York, this is somebody else, Eve Nelson, a New York attorney who has particular expertise with rare violins and art works. A few months back she decided to move the instrument from one dealer to another. She neglected to consult Mr. Twomey. He learned of this. He sent her a letter which we have a copy of threatening her with criminal prosecution for fraud. She then filed a PCC complaint against Mr. Twomey. Attorney Nelson now feels it is going to be very difficult for her or anyone else to deal with the violin. She feels

there was a—there was a—this was more of an upbeat visit. And after two years, it was, frankly, overdue. And—and she was interested in what she could do to get her blood pressure under control and—and so on. And I mentioned about exercise, I mentioned about weight.

Q Well, what—what made you suggest exercise to her?

A Because...

Q Now, what was her physical condition at this point?

A She was...

THE COURT: One question at a time.

MR. LAPLANTE: Fair enough.

A Okay. She was overweight, high blood pressure, headaches, insomnia. And I thought that the single best thing that she could do—well, the two best things that she could do to keep most of those under control is, number one, exercise—this is going to sound like a broken record, I do this all the time—and, number two, proper diet. And she had told me that—that because of the—the threats that she was getting, the harassing phone calls, still, that she was concerned that something was going to happen to her. And she was really—she really thought that, frankly, that she was going to die. And...

Q (By Mr. Laplante) Did she tell you how she thought she was going to die?

A No. But she thought that her ex-husband was going to kill her.

MR. SISTI: Objection, your Honor.

THE COURT: I'm going to sustain that objection and ask the jury to disregard it.

A I...

Q (By Mr. Laplante) Well, before you continue, she said she thought she was going to die. What did that have to do with weight gain?

A That's what I wanted to explain. One of her resistance to losing weight—and it was probably one of the most bizarre things I've ever heard in my life as a physician—was that...

MR. SISTI: I'm going to object. May we approach, your Honor?

THE COURT: Yes

(Whereupon, the following bench conference took place)

MR. SISTI: The question—the question was how does that relate to weight gain. Now, I really think we're going beyond the realm of this man's expertise. Now, he's—if anything, he's a family physician. He's making a connection...

(Several voices at once)

MR. SISTI: ... I think the state—what the state's trying to educe is that she said she was gaining weight in order to, if she was killed, so her body would be (unintelligible). Well, even if she were here right now, she couldn't testify to that. Okay? I mean,

The other thing is that it goes—and what it goes to prove in this case is it proves intent and motive. It goes to prove intent and motive in that the—the target of his threats and harassment interpreted—interpreted—his conduct as indicative of his intent and desire to kill her.

Now, but—but getting back to the medical, the last comment was stricken. All he's going to say is that she was in fear of being killed and that she wants to make her body difficult to move. That's the only reason it has medical—it has medical significance.

MR. SISTI: It has no medical significance and it's not relevant. And I think we're going—now that we have it in the proper context, your Honor, I think it's gone beyond what was offered.

THE COURT: Okay. Your objection's overruled.

(Whereupon, the following took place in open court, in the presence of the jury)

Q (By Mr. Laplante) You were tell us, Doctor, what Vicki's obesity had to do with her fear of being killed.

A She told me that the reason was she was so heavy, or one of the reasons that she was so heavy, was the face that it would make her body more difficult to move once she was killed.

Q Now, you said that was a bizarre thing to say.

A It was. It was a joke for her because she had, in her own mind, envisioned her ex-husband trying to move her—her body.

MR. SISTI: Your Honor, I'm going to object.

THE COURT: Sustained.

MR. SISTI: I'd ask that this be stricken.

THE COURT: The jury – the jury's instructed to disregard that last remark as not responsive.

Q (By Mr. Laplante) Was she joking when she said it to you, as far as you could tell?

MR. SISTI: Your Honor, could we approach on this?

THE COURT: I'll sustain the objection...

MR. SISTI: Thank you.

THE COURT: ... if that's what you want me to do.

Q (By Mr. Laplante) Based on your observations of her demeanor, did she appear to be joking to you?

MR. SISTI: Your Honor, same objection.

THE COURT: Sustained.

MR. SISTI: Thank you.

Q (By Mr. Laplante) And when the statement was made about making the body difficult to move?

MR. SISTI: Your Honor, same objection. It's going back to the same objectionable material.

THE COURT: Overruled.

Q (By Mr. Laplante) When did she say this to you?

A In July of '95.

CROSS-EXAMINATION: (By Mr. Sisti)

Q Doctor, you were telling the prosecutor that Vicki would hide things from you.

A That's not unusual. A lot of patients do that.

Q That's fine. Vicki would hike things from you?

A Yes.

Q During the course of your meetings with her to determine what her treatment should be?

A Not—yes, I guess I would have to say yes to that.

Q During the course of your meetings with her to determine what pills to prescribe?

A No. It was more having to do—this is very common with—with people, and having more to do with people always want to look good in front of their doctors, and they don't—the want to hind the things that don't make them look as good. For example, the—the one thing that she—she hid was a Portsmouth Pavilion admission in July of '94 that apparently was for a breakdown of some sort. And so she didn't want—she didn't want me to see her as weak, was my conclusion from that. But there—there weren't too many things that she did hide from me.

Q How many admissions did you tell the jury that she told you about?

A She told me about three admissions.

Q Did you know that she was hospitalized seven times for psychiatric problems?

A I—I did not know that.

Q So she hid four admissions from you, were you aware of that?

A Well, apparently not.

Q She wasn't being entirely candid and frank with you when she was going over her history with you, was she?

A No.

Q And you do know that she was involved in a fairly bitter, high-level custody dispute.

A I did know that.

Q She was represented by a lawyer, right?

A Yes, sir.

Q And you knew who the lawyer was.

A I did.

Q Okay. You were in contact with the lawyer, right?

A Not right away. That was more towards the last few months.

Q Well, she would give you information with regard to how the case was going, right?

A No, actually, she wouldn't.

Q She wouldn't?

A It wasn't until the end of—well, towards July of '96 that I had any direct information about the case.

Q Well...

effect that they couldn't get...

THE COURT: Get the foreperson...

MR. KROOK: Yes ... to agree to get information out to—if they had a question, they couldn't get the questions out. And it went on like that. And I—at that point, I—I made the—put my hands up and said, "Oops. Stop. I don't want to hear any of this. We don't want to talk about it. We can't discuss it." And there were other comments made in my presence and John Daley's presence. And...

THE COURT: What were those comments?

MR. KROOK: And they were to the effect that they wanted to see the judge, and one of the bailiff—the jurors was extremely upset and almost to the point of tears. And they were insistent about wanting to see the judge and talk about that they couldn't get it across to the foreperson, that they couldn't get her to agree about them wanting to get their questions, she wouldn't accept their questions.

And that's basically what it was all about. And with—and, as I say, I expressed that I didn't want to hear it, didn't want to jeopardize the case at this point in time by listening to them and that they would have to put any questions they had in writing, and we would present it to the judge.

THE COURT: And who—what other bailiffs were there when this conversation...

MR. KROOK: The only one I remember is John, 'cause we were the

might as well hear the question.

THE COURT: "The jury would like to know, if we have reached a unanimous verdict on one of the two charges, do we need to inform you of that fact, or do we wait until we have a decision on both charges?"

MR. TWOMEY: We'd prefer to deal with what we were dealing with first.

THE COURT: All right. This is John Daley. He's a bailiff. Mr. Daley also reported to me this morning the similar information that was given by Mr. Krook to me earlier this morning. It's now 10 minutes of 10. And, John, this morning, you had some conversation with some of the jurors...

MR. DALEY: That's correct.

THE COURT: ... on their way in.

MR. DALEY: That's correct.

THE COURT: Could you relate to us what that was.

MR. DALEY: Sure, I was approached by Juror No. 7 and Juror No. 4, a little before nine this morning, at the rear door of the court complex, where they reported to me that—Juror No. 7 specifically reported to me that she was having a conflict with the jury foreperson. They had a question and they wanted to submit it to the judge, but she wouldn't do it, how do we go about correcting the problem. And I said we stop the conversation, we said we would

them. Let's let the process work its way out.

THE COURT: What—what do you say about the fact that the jurors themselves have requested that they speak to the court?

MR. KACAVAS: Well, we don't have—I mean, we don't know how sensitive these particular two jurors are subjectively to the process. I mean, they may have made one request, and the foreperson is trying to go around the horn, and—and these people think they're snubbed or something.

THE COURT: We won't probably find that out until...

MR. KACAVAS: Let the process work its way out. If they don't—if they have a question about a unanimous verdict, they can get to poll the jury if there's a conviction. I mean, that's—that's the point of that. I think it's—at this point, we don't know where they are in the deliberative process, although that question certainly implies one—one place where they're at. But that may be the question they were seeking the answer to.

MR. TWOMEY: Well that—you know, I—in all due respect, I've got to say that's silly to think that that was the question that you had the jury split over. That—that can't...

MR. KACAVAS: Well, can I finish, Paul?

MR. TWOMEY: Oh, I'm sorry.

MR. KACAVAS: With all due respect, I mean, you don't know it was a legal question, either. That's a presumption you're making.

MR. LAPLANTE: They didn't start at nine.

THE COURT: They didn't start at nine.

MR. TWOMEY: Okay. Well, I don't know exactly what time they did start, but whatever, I don't think it makes a whole lot of difference. A period of time has gone by.

MR. LAPLANTE: Fair enough.

THE COURT: I will take it under advisement for five minutes (unintelligible).

First of all—first of all, I'm going to deny the motion. There's no question in my mind that it doesn't call for a mistrial at this point. The only issue left is whether or not you're going to question the jurors or ask them to submit something to me in writing of those—those two jurors.

MR. KACAVAS: What about the question of the jury? I'm sorry.

MR. TWOMEY: We don't want that question answered.

THE COURT: Well, let's take this up after we determine this.

MR. QUIRK: Off the record.

(Whereupon, the court was in recess from 10:04 a.m. to 10:12 a.m.)

(Whereupon, the chambers hearing continued as follows)

THE COURT: I am going to decline to talk to the two jurors. I will send them the following note: "I have received your question and

verdict voir dire of those jurors in order to preserve the right to have a record under the due-process clause of the state and federal constitutions.

THE COURT: All right. The defendant's objection is noted, and the request I'll take under advisement, later on, when the jury verdict is—if the jury verdict is (unintelligible).

MR. TWOMEY: Do you want to address the other question?

MR. LAPLANTE: What about the other question?

THE COURT: Do you want it to be on the record?

MR. TWOMEY: Might as well.

THE COURT: Okay. They should be told not to destroy that note.

MR. QUIRK: Okay. Do you want it sent into the jury right now?

MR. TWOMEY: The answer is they wait until the deliberations are done.

MR. LAPLANTE: Agreed.

THE COURT: "Please continue your deliberations..."

MR. TWOMEY: "... until you've reached a verdict on both charges."

MR. LAPLANTE: Yeah.

MR. TWOMEY: I—I think may—maybe, I don't know, just talking aloud before you sign that judge—I think perhaps you should say, "If you are unable to reach a verdict on both charges, let the court know."

MR. KACAVAS: Well, I don't think that answers that question, Judge.

MR. LAPLANTE: Motion to strike. Nonresponsive.

MR. TWOMEY: Well, I think it does. I mean, they—you should continue deliberating until you reach a verdict on both charges. If you are ultimately unable to reach one on...

THE COURT: Actually, all they want to know is are we...

MR. KACAVAS: They just...

THE COURT: ... are we—do we want to know...

MR. KACAVAS: Right.

THE COURT: ... when they've reached a verdict.

MR. KACAVAS: Right.

THE COURT: That's all they're asking. And we don't, although we are certainly curious.

MR. TWOMEY: See if they can give us a hint.

THE COURT: "Continue your deliberations until both verdicts have been determined."

MR. QUIRK: Do you want to stay on the record or off?

(Whereupon, the chambers conference concluded at 10:20 a.m.)

THE CLERK: Juror No. 11?

JUROR NO. 11: Guilty.

THE CLERK: Juror No. 12?

JUROR NO. 12: Guilty.

THE COURT: Ladies and gentlemen, you have performed your duties. I thank you very much. I would ask you to go back to the jury deliberation room at this time and remain there until such time as the court excuses you. Thank you very much.

(Whereupon, the jury exits at 3:12 p.m.)

(Whereupon, the following took place in open court)

MR. TWOMEY: Your Honor, at this time, we would ask for individual voir dire of Jurors No. 7 and No. 3 relating to the fact that they made a complaint to the court in the course of deliberation that they had been forbidden by the jury forewoman's from contacting and sending questions out to the court and it was brought to the court's attention earlier in deliberations. We, at that time, asked for a voir dire of them. It was clear that one of those jurors was in tears as she left the court today. That's a juror who ask the bailiff to notify the court that she wished to speak to the court earlier.

Your Honor, we ask for an individual voir dire of that juror, as well as Juror No. 3, who was another juror who contacted a bailiff and indicated that she needed to talk to the court earlier and that her questions were not being brought to the (unintelligible) for the court. For those reasons we ask for an individual voir dire at this time of those two jurors.

MR. KACAVAS: Your Honor, the state objects to the request for many of the same reasons that we articulated yesterday. I would only add that the court's answer to the jury question, I think, resolved that problem. And if any of the jurors, including Jurors 3 and 7, had questions, I be-

lieve the court's answer to the question that was submitted invited them and invited the questions to be put forth. And I believe that the court's answer resolved the problem, and there's no need for individual voir dire of those two jurors at this point.

THE COURT: All right. The defendant's motion is denied. Mr. Bader, please rise.

Mr. Bader, you've been convicted of first-degree murder. Under the provisions of RSA 630:1-A-111, a person convicted of murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time. You are so sentenced. And that is my sentence to you, Mr. Bader.

The sentencing on the matter of conspiracy to commit murder will be continued, pending receipt of a probation report. That's all.

(Whereupon, the court was adjourned at 3:15 p.m.)

inform the judge, that all questions to the judge would be put in writing. She appeared very upset, near tears. And we instructed her to come into the building. And we informed the judge shortly after that time.

THE COURT: Any questions?

MR. TWOMEY: No.

MR. LAPLANTE: (unintelligible)

MR. DALEY: No. 7.

MR. LAPLANTE: When you say Juror No. 4, could you describe her.

MR. DALEY: Juror No. 4, I'm sorry, she would be Juror No. 3 now, I believe. Correct.

MR. LAPLANTE: Nothing further.

MR. TWOMEY: We're gonna move for a mistrial at this point, your Honor. It's fairly clear from those events that there was two members of the jury had legal questions of the court that were not allowed to be answered. That question that came up can't be those questions, because that question reflects a unanimity of the jury. So it can't be the question that they had. I mean, I think, common sense, it can't be the question, anyway.

The fact of the matter is that there are two jurors that have legal questions that were upset to the point of being near tears, that requested to see the court and get answers to that questions, that were being denied the right to get answers from the court, by if not

POLYGRAPH EXAMINATION
OF *(redacted)*

Polygraph examination conducted by Examiner George Tetreault, at the New Hampshire State Prison, Concord, New Hampshire, on Monday, May 21, 2001, and as recorded on video cassette tape by Carl Tuttle.

MR. TETREAULT: A copy of this goes to your attorney. He's gonna get a copy of the report. By no means can I assure that that's (unintelligible).

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: Okay.

MR. *(REDACTED)*: That's the only reason he's lying.

MR. TETREAULT: I know it. Okay. Now, listen, before you do anything, before you even sign it, let me explain something to you about it. I want you to understand a little bit more. I'm here to help you establish credibility. That's the primary reason I'm here, okay?

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: Now, you see all this equipment here? You've never taken one before, have you?

MR. *(REDACTED)*: Yeah, I have.

MR. TETREAULT: Where?

MR. *(REDACTED)*: (unintelligible)

MR. TETREAULT: Okay. Down in Boston?

MR. *(REDACTED)*: Yeah.

MR. TETREAULT: (unintelligible)

MR. *(REDACTED)*: No (unintelligible)

MR. TETREAULT: (unintelligible)

MR. *(REDACTED)*: It was, uh, basically, that they said that I saw something happen in the club and I said didn't. And then they were gonna try to charge me with obstruction of justice. And then I said, Well, I want a polygraph test, 'cause I didn't see anything. And I did one. So...

MR. TETREAULT: Okay.

MR. *(REDACTED)*: I come from a strange family.

MR. TETREAULT: Okay.

MR. *(REDACTED)*: I was never left alone.

MR. TETREAULT: It seems like it.

Really, this equipment is similar to what you had done to you. How long ago was that?

MR. *(REDACTED)*: Oh, about ten—eight to ten years ago.

MR. TETREAULT: Ten years ago. Okay. Well, you got two going on your stomach, one across the top of your chest, a blood pressure cup on your arm, and two tabs on your fingertips. Okay. Do you remember that?

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: Okay. So there's nothing here to harm you, okay?

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: There might be a little discomfort 'cause the, uh, the cuff (unintelligible) after about three minutes. It takes about three and a half minutes to do a chart.

So I want you to understand the, uh, uh—while you are connected to all of this equipment, I would never ask you a single question unless it's one that you and I have gone over together word for word.

MR. *(REDACTED)*: Right.

MR. TETREAULT: I don't want you to be surprised, I don't want you to be confused, and I don't want you to have any words that would sound ambiguous to you. Okay?

MR. *(REDACTED)*: Okay.

MR. TETREAULT: All right. And, like I said, it's gonna take about three to three and a half minutes to do a graph, maybe four, depending on how we pace them out. And, uh, we're gonna pause between each one. And if you feel nervous about doing this, if that was a problem, we wouldn't—wouldn't be able to do anybody. Okay?

MR. *(REDACTED)*: Right.

MR. TETREAULT: So I'm gonna give—make sure you get a good test here today.

MR. *(REDACTED)*: Okay.

MR. TETREAULT: All right. Now, you can—do you want me to read this to you?

MR. *(REDACTED)*: No, I'm all set.

MR. TETREAULT: Okay. And you sign there.

(Mr. *[redacted]* signs paper)

MR. TETREAULT: Would you like to witness this, uh, Carl?

MR. TUTTLE: Sure.

MR. TETREAULT: This is Carl Tuttle. He's an associate of mine in my (unintelligible). We're out of Portsmouth, and we operate in all six New England states. Okay?

(Mr. Tuttle signs paper)

MR. TETREAULT: I'm gonna do a little biographical sketch of you.

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: And then we're going to—I'm gonna obtain some physical data and some basic information. Then we're going to, uh, discuss the issues. I'm gonna formulate questions and we're gonna review the questions, and then we're going to hook up.

MR. *(REDACTED)*: I remember.

MR. TETREAULT: Okay. All right.
Do you have an *(redacted)* on the end of your name?

MR. *(REDACTED)*: On my last name?

MR. TETREAULT: Yeah.

MR. *(REDACTED)*: Yes.

MR. TETREAULT: And your middle initial?

MR. *(REDACTED)*: *(Redacted)*.

MR. TETREAULT: Any junior?

MR. *(REDACTED)*: *(Redacted)*.

MR. TETREAULT: Where were you born, uh, *(redacted)*?

MR. *(REDACTED)*: *(Redacted)*.

MR. TETREAULT: Been down there a lot.

MR. *(REDACTED)*: A *(redacted)* ring, huh?

MR. TETREAULT: Yeah.

MR. *(REDACTED)*: My father got out of quite a few speeding tickets that way, I want to tell you.

MR. TETREAULT: Oh, yeah? He was a *(redacted)*?

MR. *(REDACTED)*: My dad? Oh, yeah. He'd to—cops saw that—they'd see that, and they'd go, Oh, how you doin' here? Just slow it down, sir. You know, see you later.

MR. TETREAULT: What's your date of birth?
MR. *(REDACTED)*: *(Redacted)*.
MR. TETREAULT: Now, I know we're here in Concord, and I wrote that on—on the thing here that you—Concord, New Hampshire, is where you're at now.
MR. *(REDACTED)*: Mm-hmm.
MR. TETREAULT: But your—your home address.
MR. *(REDACTED)*: Is, uh, *(redacted)*.
MR. TETREAULT: *(Redacted)*?
MR. *(REDACTED)*: Yeah. P.O. Box *(redacted)*.
MR. TETREAULT: P.O. Box what?
MR. *(REDACTED)*: *(Redacted)*.
MR. TETREAULT: How told are you?
MR. *(REDACTED)*: Uh, *(redacted)*.
MR. TETREAULT: And your weight's running about?
MR. *(REDACTED)*: *(Redacted)*.
MR. TETREAULT: Are you working out here?
MR. *(REDACTED)*: Just racquetball and handball.
MR. TETREAULT: Okay. Are you single?
MR. *(REDACTED)*: No, I'm married.
MR. TETREAULT: Your wife's first name?
MR. *(REDACTED)*: *(Redacted)*.
MR. TETREAULT: Any children?
MR. *(REDACTED)*: Um, *(redacted)*.
MR. TETREAULT: How many children?
MR. *(REDACTED)*: *(Redacted)*.
MR. TETREAULT: How do you feel today physically? Is there any aches or pains (unintelligible)?
MR. *(REDACTED)*: (Shakes head negatively)
MR. TETREAULT: Have you been in the hospital in the past (unintelligible)?
MR. *(REDACTED)*: No.
MR. TETREAULT: Do you have trouble with your nerves requiring medication?
MR. *(REDACTED)*: No.

MR. TETREAULT: Have you undergone psychiatric counseling for any mental disorders in the last year or so?
MR. *(REDACTED)*: Um, no.
MR. TETREAULT: Do you have a history of heart trouble?
MR. *(REDACTED)*: No.
MR. TETREAULT: As far as you know, your blood pressure is—is normal?
MR. *(REDACTED)*: Yep.
MR. TETREAULT: And you've taken no pills or medicine today?
MR. *(REDACTED)*: (Shakes head negatively)
MR. TETREAULT: Did you sleep well last night?
MR. *(REDACTED)*: Yes.
MR. TETREAULT: Okay. And so you know approximately how many hours?
MR. *(REDACTED)*: I'd say 11 to seven-thirty.
MR. TETREAULT: Okay, so eight and a half hours?
MR. *(REDACTED)*: Yeah.
MR. TETREAULT: Yes. And that was in Boston?
MR. *(REDACTED)*: (No response)
MR. TETREAULT: Did you graduate from high school?
MR. *(REDACTED)*: No.
MR. TETREAULT: Did you receive a GED?
MR. *(REDACTED)*: No.
MR. TETREAULT: Any military?
MR. *(REDACTED)*: No.
MR. TETREAULT: And right now you're unemployed.
MR. *(REDACTED)*: (No response)
MR. TETREAULT: Okay.
MR. *(REDACTED)*: I've got to say, Paul's a great communicator.
MR. TETREAULT: No kidding.
MR. *(REDACTED)*: (Laughs)
MR. TETREAULT: Well, I think (unintelligible).
MR. *(REDACTED)*: I know him, right. This is the first thing I've had a problem communicating with him on.

MR. TETREAULT: I've got this, all of this information from Seth and, uh, his attorney on a motion to the supreme court.

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: And, uh, what—what I did was I formulated basically all the questions on the test. Now, from what we understand here is that, uh, three points—or main—the main three points of interest are that Stuto told you that during his trial, his testimony was false as to Seth's invol—involvement in the murder, that Joseph actually did murder her; that—that, uh, you also informed Attorney Cross of (unintelligible).

MR. *(REDACTED)*: Basically, yeah.

Is that all?

MR. TUTTLE: You can say anything you want.

MR. TETREAULT: You can say what you want because you're—as long as you don't swear.

MR. *(REDACTED)*: Okay.

MR. TETREAULT: Try not to do that.

MR. *(REDACTED)*: Yeah. I'm gonna right now.

MR. TETREAULT: For—before, um, Seth's conviction, (unintelligible).

MR. *(REDACTED)*: Yeah.

MR. TETREAULT: And then, uh, no one has tried to pay you or induce you in any way to come here and take this and make these statements or anything like that?

MR. *(REDACTED)*: Absolutely not.

MR. TETREAULT: All right.

MR. *(REDACTED)*: I saw it on TV, what the kid was saying. And I called my lawyer at the time, who was Philip Cross; um, and told him, I says—we were just talking about, in general conversation, about my case coming up. It happened to be in Rockingham County at the time, and I said to, um, I said—I says to Phil Cross on the phone, I said, Hey, these people go on the stand and just lie in New Hampshire. I said, They think they can get on the stand and say whatever they want, as long as

it's for the state. The state doesn't care about going out of their way to prove that they're lying; they go out of the way to avoid to provide that the person's lying, because it's helping the state lock somebody up and they think they're done with them.

And I said—he goes—and he said to me, What do you mean by that? I said, The kid said he testified to this, this, this and this. And that's why even when he said it—I was locked up with him in the county farm at the time—he was on my pod—he told me the whole—he said that he didn't have nothing to do with it, they were all banging Seth's ex-girlfriend, and there was a big plot about getting money out of—for the insurance and all this stuff and all that stuff and Seth wouldn't have no knowledge of it. And Seth didn't even know his girlfriend was screwing around with these kids, you know, and his step—and his son.

And he says, Oh really. He says, Oh, how do you know this? And I told him, not knowing that he was Set's son's lawyer. And this was in the middle of my trial. All on the phone. He's like, Oh, so what else did he say? And I told him. And then I talked to him at the county. When I came here, I talked to him again, and he says, uh, he says—he says to me something about, Oh, Stuto's up there, huh? I said, Yeah. He goes, Oh, he says, I guess everything went all right, though; you know, little Joey's down at wherever he's at, you know, blah-blah-blah. He said, What else did he say? And he kept on asking me questions about it, and I didn't know any—any more information than what the kid said to me at the county farm, so I couldn't tell him anything more.

I said, Now, look—and then he said, You know, it's funny, it's a coincidence, it's (unintelligible), you know, I'm—I'm—I'm Seth's son's lawyer. I said, What? He goes, I'm Seth's, you know, his son's lawyer...

MR. TETREAULT: Who?

MR. *(REDACTED)*: ...or the guardian ad litem attorney, whatever.

MR. TETREAULT: Yeah.

MR. *(REDACTED)*: He said—I said, Really? He said, Yeah. I says, I said, Oh, shit. And he said, Well—and I don't remember what else what he said, but it was just like he told me that he was Seth's—and—and through the whole trial, he said—you know, he never said anything about him being his attorney. If he did, I wouldn't have said nothing.

So I'm sitting there going, Huh—and I guess Paul called him on it, and he's denying ever having that conversation with me. And I told him, I said, these phones are all recorded. Pull back the dates of everything. Now they're not recorded, 'cause they're not recorded until an attorney applies for a special acceptance *[sic]*. But before we had a different phone system.

MR. TETREAULT: Yeah.

MR. *(REDACTED)*: And now I don't know how far back the records go, and I don't know if they record every single phone conversation or not unless they're targeting a certain individual (unintelligible).

So, I mean—I mean, he—he said—he's saying he never talked to me about it. I mean, I got paperwork that he lied on my case; telling me they had evidence against me they didn't even have, to get me to plead out the case 'cause he didn't want to do 16 felony charges.

MR. TETREAULT: Okay.

MR. *(REDACTED)*: Will I walk out of here with a clear conscience knowing that I told the truth when I leave here?

MR. TETREAULT: You sure will.

MR. *(REDACTED)*: Knowing your machine says that I did?

MR. TETREAULT: I'll give you the results.

We'll boot it up and, uh, make up some questions (unintelligible).

How much time do you have left?

MR. *(REDACTED)*: I got, uh, next year is my minimum; my maximum is *(redacted)*.

I was kind of worried about this whole thing, you know, in the time of my, uh, stay here due to the fact of, uh—I mean, I've seen a guy get convicted of a crime after I was told a whole different story about the thing. And I just don't see that a guy gets his life taken away and everything else, because—this is a crazy state, a crazy state.

MR. TETREAULT: Okay on the input. Let me explain to you now what's gonna happen. And the very first thing you're going to hear from me, once we connect is to remain still, the test is about to begin. And then the very first question you're going to hear from me, "Is your true name *(redacted)*?" Okay?

And when I explained to you that I do not ask unreviewed questions before—and you remember I said to you once you're connected, I will not ask you a question unless it's one you and I go over word for word?

MR. *(REDACTED)*: Okay.

MR. TETREAULT: And the reason for that, I'm gonna ask you on the test, "Do you believe me when I promise you I will not ask any questions unless it's one we went over word for word." Okay?

MR. *(REDACTED)*: You're gonna ask me if I believe you?

MR. TETREAULT: Yeah. If you don't...

MR. *(REDACTED)*: (unintelligible)

MR. TETREAULT: Okay. Because I've never done it in the 28 years I've been testing. Okay?

MR. *(REDACTED)*: Okay.

MR. TETREAULT: Now, the very first question leading into what's relevant is, "regarding whether or not Sandro Stuto actually told you that Joseph was the one who killed Seth Bader's ex-wife, Vicki, do you intend—do you intent to answer each question about that truthfully?"

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Okay. Now, "Did you" – I mean, "Did Santo Stuto tell you that he lied during the trial about Seth Bader and it was actually Joseph who fired that fatal shot?"

MR. *(REDACTED)*: No. He – he never told me that – who did it. He just said that Seth didn't do it, didn't have anything to do with it.

MR. TETREAULT: Okay. So...

MR. *(REDACTED)*: He never said who did it.

MR. TETREAULT: Okay. He never said...

MR. *(REDACTED)*: Yeah. I don't want that to being my question and then the answer on it, because that would be untrue. He did not tell me who did it; he just said that Seth didn't do it.

MR. TETREAULT: Okay. I'm gonna change that around.

MR. *(REDACTED)*: Yeah. He never said who did it. (unintelligible)

MR. TETREAULT: Well, that's why we're doing this now and getting it straight.

MR. *(REDACTED)*: Yeah.

Who sees this tape?

MR. TETREAULT: Uh, the judge – I guess whatever – whatever judge is gonna be in the supreme court.

MR. *(REDACTED)*: Right.

MR. TETREAULT: And I'm told it has to be on video tape, because otherwise, I normally don't videotape.

MR. TUTTLE: They'll get the tape, and that'll be the end of that.

MR. TETREAULT: They're – they're going to make sure that another independent examiner is looking at it to see to it that the testing is done without any kind of (unintelligible) and that I'm not – to make sure I'm not a corrupt polygraph examiner, okay?

I changed that question now to read this way: "Regarding whether or not Sandro Stuto actually told you that Seth was not the one who killed Vicki Bader, do

you intend to answer each question about that truthfully?" How does that sound?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Now the next question I'm gonna change—okay—"Did Sandro Stuto tell you that he lied during the trial..."

MR. *(REDACTED)*: No.

MR. TETREAULT: "...of Seth Bader; that it was not Seth Bader who fired that fatal shot?"

"Did Sandro Stuto say that he lied during the trial of Seth Bader..." I'll change that and rephrase that, shorten it up. "...that he lied during the trial and it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?"

What—what band is it, fifth?

MR. TUTTLE: One

MR. TETREAULT: I'm gonna leave it like it is.

"Before Seth Bader was convicted, did you inform Attorney Philip Cross of Portsmouth about Sandro Stuto's false testimony?

MR. *(REDACTED)*: Yes, I did.

MR. TETREAULT: "Did Seth Bader or anyone else try to induce you into fabricating any part of your statements concerning what Sandro Stuto told you?"

MR. *(REDACTED)*: No. I didn't even know Seth until after—I never had (unintelligible). When I was at the county farm, I didn't know him. I was never at the county farm with him.

MR. TETREAULT: Okay. "Not connected with this case at all, do you remember ever lying just to get someone else into trouble?"

MR. *(REDACTED)*: Yes.

MR. TETREAULT: You do?

MR. *(REDACTED)*: Yeah.

MR. TETREAULT: You remember specifically what it was?

MR. *(REDACTED)*: Yeah. I broke my dirt bike and I blamed it on my brother, 'cause (unintelligible).

MR. TETREAULT: Anything else?

MR. *(REDACTED)*: No. As far as—as far as when, um...

MR. TETREAULT: Try to remember the key word.

MR. *(REDACTED)*: You mean with law enforcement?

MR. TETREAULT: Huh?

MR. *(REDACTED)*: With law enforcement?

MR. TETREAULT: "Not in connection with this case, do you remember ever lying just to get someone else in trouble?"

MR. *(REDACTED)*: If telling on my brother to my mother about breaking my bike is relevant, then, yeah. But anything else as far as that, no, I don't believe so.

MR. TETREAULT: All right. The next one alone those lines: "Not connected to this case," —now, you're probably gonna say "yes" again—uh, "do you remember ever telling a serious lie to someone in authority?"

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Do you want me to put—I'm gonna put it up in limbo.

MR. *(REDACTED)*: What? Put what...

MR. TETREAULT: You can tell it.

MR. *(REDACTED)*: Oh, they asked me if I had broken (unintelligible) and I said, No. And I did.

MR. TETREAULT: I'll change that question a little bit. Okay. "Other than what you already told me and not connected to this case, do you remember—do you still remember ever telling a serious lie to someone else in authority, other than what you told me before?"

MR. *(REDACTED)*: No.

MR. TETREAULT: Okay. "And not connected to this case, do you remember ever lying to keep yourself out of serious trouble?"

MR. *(REDACTED)*: No. I pled guilty to all my charges.

MR. TETREAULT: Okay.

MR. *(REDACTED)*: (unintelligible)

MR. TETREAULT: Okay. We'll go over the whole thing here in a second. And when the test is gonna go down, I'll let you know when it is. (unintelligible)

"Other than what you've already told me and not connected with this case, do you remember—do you still remember..."

Let me go down the whole list of questions as we have 'em on the test and as we're going to go down once you're connected, okay?

MR. *(REDACTED)*: Mm-hmm.

MR. TETREAULT: I want you to remain still. The test is about to begin. Is your true name *(redacted)*?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Do you believe me when I promise you I will not ask any questions unless it's one we went over word for word?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Regarding whether or not Sandro Stuto actually told you that Seth was not the one that killed Vicki Bader, do you intend to answer each question about that truthfully?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected with this case, do you still remember ever lying just to get someone else into trouble?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Well, other than what you've already told me.

MR. *(REDACTED)*: Oh, no, no.

MR. TETREAULT: Okay. Did Sandro Stuto tell you that he lied during the trial and it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected to this case, do you still remember ever telling a serious lie to someone else in authority?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me.

MR. *(REDACTED)*: Oh, no, no, no.

MR. TETREAULT: That's the key word...

MR. *(REDACTED)*: No, other than—other than whatever I told you, no.

MR. TETREAULT: And, uh, before Seth Bader was convicted, did you inform Philip Cross of Portsmouth about Sandro Stuto's false testimony?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: And not connected to this case, do you remember ever lying to keep yourself out of serious trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did Seth Bader or anyone else try to induce you to fabricate any part of your statements concerning what Sandro Stuto told you?

MR. *(REDACTED)*: No.

MR. TETREAULT: Remain still. This portion of your test is over.

Now, we may have to run more than two tests; we may have to run three, just to get two good enough charts for the computer to analyze.

MR. *(REDACTED)*: Right.

MR. TETREAULT: And once—once I get you all hooked up and he's got you on camera, he's gonna leave the room. Okay? So he won't be distracting to you.

MR. *(REDACTED)*: He doesn't distract me.

MR. TETREAULT: No. We'll...

MR. *(REDACTED)*: All right.

MR. TUTTLE: It's one-on-one time. It's an...

MR. TETREAULT: We want to make sure that...

MR. TUTTLE: ...automatic thing that we always do.

MR. TETREAULT: ...one-on-one.

MR. *(REDACTED)*: All right.

MR. TETREAULT: Okay? That's just the way that—we'll get out of this mode.

Okay. Can you get up for a minute, *(redacted)*. And have a seat right there.

This looks around your abdomen. I'll put this one across the top of your chest.

(Mr. Tetreault hooks Mr. *(redacted)* up to machine)

(Tape stops during remainder of hookup procedure)

MR. TETREAULT: (unintelligible) just don't be rigid. The key to a good chart and a good physiological tracing on the chart is not to move. Okay? Because that causes distortion. Okay?

Have we got *(redacted)* in the picture?

MR. TUTTLE: Yes. You're all set. Okay.

MR. TETREAULT: Yep.

(Mr. Tuttle leaves room)

MR. TETREAULT: (Unintelligible talk about blood pressure cuff)

Okay. I want you to, uh, please remain still. The test is about to begin.

Is your true name *(redacted)*?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Do you believe me when I promise you I will not ask any questions unless it's one we went over word for word?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Regarding whether or not Sandro Stuto actually told you that Seth was not the one who killed Vicki Bader, do you intend to answer each question about that truthfully?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected with this case, do you still remember ever lying just to get someone else into trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did, uh, Sandro Stuto tell you that he lied during the trial and it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected to this case, do you still remember ever telling a serious lie to someone else in authority?

MR. *(REDACTED)*: No.

MR. TETREAULT: Before Seth Bader was convicted, did you inform Attorney Philip Cross of Portsmouth about Sandro Stuto's—Stuto's false testimony?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Not connected to this case, do you remember ever lying in order to keep yourself out of serious trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did Seth Bader or anyone else try to induce you to fabricate any part of your statement concerning what Sandro Stuto told you?

MR. *(REDACTED)*: No.

MR. TETREAULT: Okay. I want you to please remain still now. This portion of your test is over.

Stay still for a moment.

(unintelligible)

MR. *(REDACTED)*: Okay.

MR. TETREAULT: Do you feel like you're comfortable and you can continue?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Okay. That was fine. You did very good; you didn't make any moves. Try to do that again.

Okay. I want you to please remain still now. The test is about to begin.

Is your true name *(redacted)*?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Did you believe me when I promised you that I will not ask any questions unless it's one we gone over word for word?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Regarding whether or not Sandro Stuto actually told you that Seth was not the one who killed

Vicki Bader—Bader, do you intend to answer these questions truthfully?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Not connected with this case, other than what you've already told me, do you still remember ever lying just to get someone else into trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did Sandro Stuto tell you that he lied during the trial and it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected to this case, do you still remember ever telling a serious lie to someone else in authority?

MR. *(REDACTED)*: No.

MR. TETREAULT: Before Seth Bader was convicted, did you inform Attorney Philip Cross of Portsmouth about Sandro Stuto's—Stuto's false testimony?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Not connected to this case, do you remember ever lying in order to keep yourself out of serious trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did Seth Bader or anyone else try to induce you to fabricate any part of your statements concerning what Sandro Stuto told you?

MR. *(REDACTED)*: No.

MR. TETREAULT: Please remain still. This portion of your test is over. Stay still for a moment.

(unintelligible)

MR. *(REDACTED)*: Okay.

MR. TETREAULT: That should do it.

Let me know when you're not feeling comfortable, okay?

MR. *(REDACTED)*: Yep.

MR. TETREAULT: All right. Look straight ahead, I'll remind you, once again, to try not to make any (unintelligible).

Okay. I want you to please remain still now. The test is about to begin, once again.

Is your true name *(redacted)*?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Did you believe me when I promised you I will not ask any questions unless it's one we've gone over word for word?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Regarding whether or not Sandro Stuto actually told you that Seth was not the one who killed Vicki Bader, do you intend to answer each question about that truthfully?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected with this case, do you still remember ever lying just to get someone else into trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did, uh, Sandro Stuto tell you that he lied during the trial and it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Other than what you've already told me and not connected to this case, do you still remember ever telling a serious lie to someone else in authority?

MR. *(REDACTED)*: No.

MR. TETREAULT: Before Seth Bader was convicted, did you inform Attorney Philip Cross of Portsmouth about Sandro Stuto's—Stuto's false testimony?

MR. *(REDACTED)*: Yes.

MR. TETREAULT: Not connected to this case, do you remember ever lying in order to keep yourself out of serious trouble?

MR. *(REDACTED)*: No.

MR. TETREAULT: Did Seth Bader or anyone else try to induce you to fabricate any part of your statement concerning what Sandro Stuto told you?

MR. *(REDACTED)*: No.

MR. TETREAULT: Remain still. This portion of your test is over.

Okay. I'm gonna take all of the equipment off you in a second.

Okay.

(Mr. Tetreault removes equipment from Mr. *[redacted]*)

MR. TETREAULT: You can turn around, if you'd like.

MR. *(REDACTED)*: (unintelligible)

(Female enters the room)

MR. TETREAULT: Is he coming?

FEMALE: Do you need (unintelligible)?

MR. TETREAULT: No. I need Carl Tuttle, the other guy, the guy running the camera.

FEMALE: The guy that was running the camera, what?

MR. TETREAULT: Carl Tuttle. He went out that way.

FEMALE: Okay.

MR. TETREAULT: Thank you.

(Female leaves room)

MR. *(REDACTED)*: (unintelligible) a little sex into the program, huh? (Laughing) 'Cause they've got a date for you before you go.

Do you know what I think should be a question on one of those things (unintelligible), "Have you ever had any sexual relationships while you've been incarcerated?" (Laughing) (unintelligible)

(Mr. Tuttle re-enters room)

MR. TETREAULT: I'm in the analysis phase now. I'm just looking at the numbers.

Could you watch from your chair?

MR. *(REDACTED)*: Uh, no, I was on the other side.

MR. TETREAULT: I scored that (unintelligible) manually. You can see a big difference. It was more in control that

it is (unintelligible). That's why I think my, uh, scoring is gonna make the difference.

(Mr. Tetreault shows computer to Mr. *[redacted]*)

MR. *(REDACTED)*: (unintelligible)

MR. *(REDACTED)*: (unintelligible)

MR. *(REDACTED)*: You can tell, right?

MR. TETREAULT: It's over. You can relax.

MR. *(REDACTED)*: I just—I told Paul I'm worried about my name being attached to this too much because, like I said, I come from a—a family that seems to always have people looking at them. And I have nothing to do with what they do with their lives, but they're still involved with things that they shouldn't be involved in; and I don't want to be accused of being a—uh, well I don't know if this can be—I don't know if this classifies me being a rat, but all I know is if a guy goes to prison for something he didn't do and everybody know that the guy didn't do it, he should—if a police officer came forward and said, I got evidence that this guy didn't do this and disputes this guy—what this guy said, he's not looked upon as a rat.

MR. TUTTLE: You gotta do the right thing.

MR. *(REDACTED)*: You know what I mean?

MR. TUTTLE: Yeah.

MR. *(REDACTED)*: I mean, I—I never met the guy till I came here. And as far as I can tell you, you know, as far as I go, I—that guy's a coward. He doesn't have a mean bone in his body. He walks around here and he's—he's scared of his own shadow.

MR. TUTTLE: Good luck to you.

MR. *(REDACTED)*: All right. Take it easy.

MR. TUTTLE: Okay.

MR. *(REDACTED)*: Tell Paul because of his beautiful, beautiful heads-up on t his, I'm gonna have to—I'm gonna have a little talk with him.

You know, (unintelligible).

MR. TETREAULT: (unintelligible)

MR. *(REDACTED)*: You can see why murders happen in here and no one knows about it till three days later, right?

MR. TETREAULT: Good luck. Thanks for coming.

MR. *(REDACTED)*: No problem. I was just (unintelligible) about it, and he told me there was gonna be here...

(Several voices at once)

MR. *(REDACTED)*: ...come up here before you and try to because they know that he's doing this. And they're kind of, uh—he said that the judge ruled that even if I was telling the truth, it's irrelevant. And then the judge is trying to say that I've lied—I've lied! Where would I ever get a chance to lie? I've pleaded guilty to ever charge I've had in this state. There's no—what's he talking about, I'm lying? It's only...

MR. TETREAULT: Yeah. This is gonna be an interesting hearing in front of the supreme court.

MR. *(REDACTED)*: Yeah. You know (unintelligible) when I've lied? I told you.

MR. TETREAULT: Right. Well, I'm—I'm behind you know, kid. Okay. Is that off?

MR. TUTTLE: Not yet.

(End recording)

* * *

CERTIFICATE

I, Judith A. Park, a transcriptionist approved by the Supreme Court of the State of New Hampshire, do hereby certify that the foregoing is a true and accurate transcript, to the best of my knowledge and belief, of the POLYGRAPH EXAMINATION OF *(REDACTED)* held at the place and on the date hereinbefore stated and as recorded on video cassette tape by Carl Tuttle.

I further certify that I am neither attorney nor counsel for, nor related to, nor employed by any of the parties to the action pertaining to this polygraph examination; and further, that I am not a relative or employee of any attorney or counsel employed in this matter, nor am I financially interested in the action.

Dated at Hampton, New Hampshire, this 18th day of July 2001.

s/Judith A. Park

STATE V. BADER, 98-472 (N.H. 9-13-2002)
THE STATE OF NEW HAMPSHIRE v. SETH BADER
No. 98-472
Supreme Court of New Hampshire
Rockingham
Argued February 6, 2002
Opinion Issued September 13, 2002

Philip T. McLaughlin, attorney general (N. William Delker, senior assistant attorney general, on the brief and orally), for the State.

Law Office of Paul J. Haley, of Hillsborough (Paul J. Haley on the brief and orally), for the defendant.

DALIANIS, J.

The defendant, Seth Bader, was convicted of first degree murder, see RSA 630: 1-a (1 996), and conspiracy to commit first degree murder, see RSA 629:3 (1 996), in the death of his former wife, Vicki Lynn Bader, following a jury trial in the Superior Court (Murphy, J.). The defendant appeals both convictions and the denial of his motion for a new trial. We affirm.

This appeal has a convoluted procedural history. Following his convictions in the superior court, the defendant filed a notice of appeal, which alleged thirteen grounds for error. Subsequent to our acceptance of his appeal, the defendant filed a motion for a new trial in the superior court. We granted the defendant's motion to remand the case to the superior court so that it could decide the five issues raised in the motion for a new trial. In one issue, the defendant contended that now-Chief Justice Walter L. Murphy (Judge Murphy) should have recused himself from presiding over the defendant's trial, and he moved to recuse Judge Murphy from presiding over the motion for a new trial. After a hear-

ing, the Superior Court (Murphy, J.) denied the defendant's motion to recuse.

After a subsequent hearing, the superior court rejected the remaining four issues in the defendant's post-trial motion. Thereafter, we granted the defendant's motion to amend his notice of appeal to include the five issues raised in his motion for a new trial. In his brief, however, the defendant pursued only the five issues raised in his motion for a new trial. Consequently, we limit our review to those issues, specifically: 1) recusal of the trial judge; 2) discovery of exculpatory evidence; 3) hearsay evidence; 4) alleged intra-jury misconduct; and 5) newly discovered evidence. See State v. Bathalon, 146 N.H. 485, 490 (2001) (issues raised in the notice of appeal, but not briefed, are deemed waived).

I. Recusal of the Trial Judge

After the defendant was arrested in April 1997 and charged with murder and conspiracy to commit murder in the death of his former wife, the administrator of her estate brought a wrongful death suit against the defendant on behalf of the estate. The administrator also sought an ex parte attachment on the defendant's assets and an injunction to bar him from expending any of those assets. Judge Murphy granted the ex parte attachment and ordered the defendant not to make "any extraordinary expenditures" without court approval.

Judge Murphy also granted the defendant's request for an extension of time to file an objection and request for hearing on the attachment. The attachment was later modified by agreement of the parties and the matter was deferred pending resolution of the criminal charges. In May 1997, then-Chief Justice Joseph P. Nadeau assigned all . criminal, civil or equity cases involving the defendant to Judge Murphy.

Judge Murphy set bail at $750,000, an amount the defendant contends he could have met but for the previously-ordered attachment. The defendant then petitioned this court for a writ of habeas corpus in order to challenge the bail

order. On September 18, 1997, we denied the defendant's petition. On the same date, the superior court was notified that the defendant's counsel in the civil cases withdrew from representation. In October 1997, the defendant's new counsel in the civil cases filed a motion for summary judgment and a motion to vacate the attachment. In November 1997, "[in light of the allegations contained in [the] defendant's pleadings . . . [and] having been specially assigned to, and having made various rulings in the criminal case," Judge Murphy recused himself from further participation in the civil cases. At a later hearing on the status of counsel, Judge Murphy declined to discuss the merits of the defendant's argument regarding the civil cases, stating that he had recused himself "because of a writ of habeas corpus that was filed on [the defendant's] behalf, which I thought contained all kinds of misstatements."

The defendant contends that Judge Murphy's failure to recuse himself from presiding over both his trial and motion for a new trial violated his due process rights under the United States and New Hampshire Constitutions. We first address his claim under the State Constitution, State v. Ball, 124 N.H. 226,23 1 (1983), and look to the principles of fundamental fairness, see State v. Graf 143 N.H. 294,302 (1999). Because the Federal Constitution offers the defendant no greater protection in these circumstances, we need not conduct a separate federal analysis. See id. Accordingly, we rely upon our State Constitution and cite federal opinions for guidance only. Ball, 124 N.H. at 232-33.

The Code of Judicial Conduct requires disqualification of a judge in a proceeding in which the judge's impartiality might reasonably be questioned and to avoid even the appearance of impropriety. See Blaisdell v. City of Rochester, 135 N.H. 589,593 (1992); Sup.Ct.R. 38, Canon 3C(1) (amended 2001, current version at Canon 3E(1)). "Whether an appearance of impropriety exists is determined under an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the court." Blaisdell, 135 N.H. at 593.

The defendant argues that because Judge Murphy presided over both the tort action and the criminal proceeding, which stemmed from the same alleged transaction, his grant of the ex parte pre-trial attachment necessarily meant that he found the defendant "very likely guilty of the criminal charge and . . . very likely lacking any defense." He contends that this "mindset" required Judge Murphy's recusal from the trial and the post-trial motions. Further, he contends the judge had received evidence concerning the defendant in the ex parte civil attachment proceeding before being assigned to the criminal matter, and that the judge had become "embroiled in mutual criticism with the defendant." He argues that Judge Murphy's statement regarding the "misstatements" in the petition for writ of habeas corpus meant that the judge had concluded that the defendant was not telling the truth and that he could no longer preside over the matter. . . . It is reasonable to assume that if his hostility towards the defendant stemming from the criminal matter was sufficient to recuse himself from the civil matter, it must have extended to any and all cases in which the defendant and Judge Murphy came face-to-face . . . . [O]nce bias sufficient to require recusal exists in any case, it exists in all cases involving that judge and that litigant.

We disagree.

The defendant's first argument ignores the fact that the executor of Vicki Bader's estate sought an ex parte attachment of his assets in order to ensure that they would be available to satisfy any potential judgment in the civil action. RSA 5 11-A:8 (1997) states, in pertinent part:

Upon application to the court, in exceptional circumstances, an attachment may be ordered in advance of notice to the defendant if the plaintiff establishes probable cause to the satisfaction of the court of his basic right to recovery and the amount thereof and in addition thereto the existence of any of the following:

I. There is substantial danger the property sought to be attached will be damaged, destroyed, concealed, or removed from the state and placed beyond the attachment jurisdiction of the court.

That Judge Murphy found the estate's administrator to have shown facts upon which he could determine that the administrator had a claim and that it was likely that the defendant's assets would be placed beyond the attachment jurisdiction of the court does not mean that the court found the defendant both "very likely guilty" of, and lacking any defense to, the criminal charge. While the civil and criminal cases were grounded in the same facts, they cannot be equated, and the defendant's argument ignores the different standards and burdens of proof germane to each. We find the defendant has failed to show any evidence of Judge Murphy having acquired the "mindset" to which the defendant refers.

The defendant's remaining arguments also fail to demonstrate that Judge Murphy erred in not recusing himself from hearing the criminal trial or post-trial motions. In State v. Fennelly, 123 N.H. 378 (1983), we stated that, due to the probability of unfairness, a per se rule of disqualification applies when a judge "has pecuniary interests in the outcome, . . . has become personally embroiled in criticism from a party before him, . . . has heard evidence in secret at a prior proceeding, o r . . . is related to a party." Fennelly, 123 N.H. at 384 (quotation omitted). None of these factors is present here.

That the judge may have received evidence concerning the defendant in connection with the ex parte attachment petition before being assigned to the criminal matter does not rise to the level of "hearing evidence in secret at a prior proceeding." Hearing evidence in secret refers to a trial judge acting as a "one-man grand jury" with the power to compel witnesses to appear before the judge in secret to testify about suspected crimes. See State v. Aubert, 118 W.H. 739, 741 (1978); see also In re Murchison, 349 U.S. 133, 133-34 (1955). No such situation existed in this case. While an ex parte attachment petition was filed, there was no secrecy involved.

The defendant was afforded the opportunity to object and request a hearing. The attachment was subsequently modified by agreement of the parties. Further, the fact that the proceedings in the civil case preceded hearings in the criminal case does not change our view. We have stated that:

> Judges are quite able to put aside information gained at the time of a plea and to decide the case solely on the evidence presented at the subsequent hearings. Even judges and jurors who have in fact formed opinions prior to trial are not disqualified if they can set aside their opinions and decide the case on the evidence before them.

Aubert, 1 18 N.H. at 74 1. In addition:

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.
>
> . . . .
>
> [Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Liteky v. United States, 510 U.S. 540, 551, 555 (1994). "Adverse rulings against the defendant in the same or a prior judicial proceeding do not render the judge biased." Matter of

Hipp, Inc., 5 F.3d 109, 116 (5th Cir. 1993); see Douglas v. Douglas, 143 N.H. 419, 429 (1999).

The defendant has also failed to show that Judge Murphy was "personally embroiled in criticism from a party before him" or was "hostile" towards the defendant in any of the proceedings. Our review of the extensive record in this case found no evidence that Judge Murphy had, in any way, become embroiled in mutual criticism with the defendant. The defendant, in his petition for writ of habeas corpus, had criticized Judge Murphy's earlier rulings regarding bail. Judge Murphy had indicated that the defendant's petition contained misstatements. Neither fact, however, illustrates that Judge Murphy had either engaged in or become embroiled in personal criticism of the defendant. The one-sided personal criticism of a judge by a defendant does not equate to personal criticism of the defendant by the judge. Further, a judge's belief that a petition, filed on behalf of a defendant, contained misstatements is not equivalent to a showing of personal hostility towards the defendant. In sum, we find no violation of the defendant's right to due process in Judge Murphy's presiding over both his trial and his motion for a new trial.

II. Discovery of Exculpatory Evidence

Vicki Bader and the defendant were married in 1991 and divorced in 1994. They had three children; Joseph, who was adopted, was fourteen years old at the time of Vicki Bader's death. In November 1997, the State filed a juvenile delinquency petition against Joseph Bader, alleging his participation in the conspiracy to murder Vicki Bader. In December 1997, the State and Joseph Bader entered into a negotiated plea agreement whereby Joseph pled true to the delinquency petition. The defendant maintains that Joseph murdered Vicki Bader in exchange for sexual favors from the defendant's former fiancée, Mary Jean Martin, and that Joseph committed perjury in testifying that his father killed Vicki Bader.

The defendant contends that he was denied full access to possibly exculpatory information known to the State concerning his son Joseph in violation of his due process rights under the United States and New Hampshire Constitutions. We first address his claim under the State Constitution. Ball, 124 N.H. at 23 1. Because the Federal Constitution offers the defendant no greater protection in this context, we need not conduct a separate federal analysis. See State v. Dewitt, 143 N.H. 24, 33 (1998).

Accordingly, we rely upon our State Constitution and cite federal opinions for guidance only. Ball, 124 N.H. at 232-33.

The defendant argues that the "facts" surrounding Joseph Bader's plea agreement "are susceptible to an inference that there was a de facto contingency fee [testimony] agreement with Joseph, under which the exact extent of [the State's leniency] would depend on just how well his testimony at the defendant's trial pleased the State." Further, the defendant argues that the State either withheld discovery concerning a "leniency-for-testimony agreement" with Joseph Bader, or the State failed to notify the trial judge that Joseph, a prosecution witness, had offered false testimony concerning the agreement.

In October 1997, the superior court granted the defendant's motion for disclosure of all agreements between the State and any of his co-defendants. In January 1998, the court granted the State's ex parte motion for authorization to disclose all juvenile records of Joseph Bader to the defense in satisfaction of its discovery obligations. The State's motion included copies of the State's agreement with Joseph Bader, as well as all related pleadings and orders from the Brentwood Family Division (Family Division). The defendant followed the State's motion by filing a second motion in March 1998, and making an oral motion during his trial in April 1998, for discovery of any agreements between the State and Joseph Bader. In large part, the court granted the motions, and proceeded to conduct an in camera review of all materials

submitted by the Family Division and the division for children, youth and families (DCYF). See State v. Gagne, 1 3 6 N.H. 10 1, 105 (1 992) (providing for review of privileged or confidential records where defendant has established reasonable probability that the records contain information that is material and relevant to his defense). The court found that the materials, which included Joseph Bader's therapist's notes, contained "no information . which is exculpatory, essential to the defendant receiving a fair trial, or which relate [sic] to any understandings or agreements relative to plea decisions or other information which can be construed as Giglio materials." See Giglio v. United States, 405 U.S. 150, 154-55 (1972) (jury entitled to know of evidence of any understanding or agreement as to a future prosecution of key witness).

Following a hearing on April 10, 1998, the court ordered the State to inquire of DCYF as to any decisions made relative to any agreement that there be no contact between Joseph Bader and his juvenile service officer and to report the results of the inquiry to the defendant's counsel. Further hearings were held on April 13, 1998, regarding Joseph Bader's plea and the court granted the defendant's request for an expedited transcript of Joseph's plea hearing in the Family Division. Both the court and counsel had earlier reviewed the tape recording of the plea hearing. Subject to further review after the transcript was made available, the trial court found no evidence of any "sine qua non" for Joseph Bader's testimony.

At his trial, the defendant was permitted to cross-examine Joseph Bader regarding the terms and his understanding of his plea agreement, even if that understanding differed from the actual agreement. During cross-examination, Joseph also testified regarding his understanding that his plea agreement was not dependent upon his "performance" during the defendant's trial, and that his testimony was not a condition of his juvenile disposition.

There is no evidence in the extensive record in this case to support a conclusion that the trial court erred either in

its finding following the in camera review or in its finding of no evidence of a "sine qua non" on the part of the State in return for Joseph Bader's testimony. See State v. Wallace, 146 N.H. 146, 148 (2001) ("In reviewing the trial court's ruling, we accept its factual findings unless they lack support in the record or are clearly erroneous."). Accordingly, the defendant cannot prevail in his effort to secure a new trial on this issue as he has failed to "prove that the prosecution withheld evidence that is favorable and material." Dewitt, 143 N.H. at 33.

III. Hearsay Evidence

Dr. James Fieseher was Vicki Bader's physician from July 1992 until August 1996. At trial, the State elicited testimony from Dr. Fieseher that Vicki Bader had begun to put on weight from October of 1993 and that, at the time of her death, she was "obese." Dr. Fieseher also testified that Vicki Bader saw him for a physical examination in July 1995, and was "interested in her health" and in what "she could do to get her blood pressure under control." In addition, he testified that she told him "one of the reasons that she was so heavy, was the fact that it would make her body more difficult to move once she was killed." The doctor testified that Vicki Bader thought the defendant was going to kill her and she envisioned him trying to move her body. The court twice instructed the jury to disregard the references to the defendant. The court admitted the hearsay statements concerning Vicki's reasons for her added weight under New Hampshire Rule of Evidence 803(4), ruling that the statements were "made for the purposes of medical diagnosis or treatment," and finding that there was "an indicia of reliability to them."

On appeal, the defendant contends that the admission of Dr. Fieseher's testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution because the hearsay was from an unavailable and mentally ill declarant and accused the defendant of an element of the charged crime. While the defendant initially raised an objec-

tion to the State's notification of its intent to introduce Dr. Fieseher's testimony based upon Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment to the United States Constitution, his December 1999 motion for new trial, his January 2001 supplementary memorandum on this issue, and his brief rely solely upon a Sixth Amendment challenge. Accordingly, we limit our constitutional analysis to the defendant's Sixth Amendment challenge. Although the defendant's argument is by no means clear, we read it to encompass both a claim of trial court error in admitting the physician's statements under Rule 803(4) and a constitutional violation.

We first turn to the defendant's claim that the trial court erred in admitting Dr. Fieseher's testimony concerning Vicki Bader's statements under Rule 803(4). We will not reverse a trial court's ruling on the admissibility of evidence absent an unsustainable exercise of discretion. State v. Soldi, 145 N.H. 571, 576 (2000); see State v. Lambert, 147 N.H. 295, 296 (200 1) (explaining unsustainable exercise of discretion standard).

"The rule against hearsay holds that hearsay evidence is generally inadmissible, subject to certain well-delineated exceptions." Soldi, 145 N.H. at 575 (quotation omitted). Rule 803(4) excepts from the rule against hearsay:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.

"The underlying purpose of this exception is that statements made with the purpose of obtaining medical attention in the form of diagnosis or treatment are inherently reliable because such statements are made usually with the motivation to obtain an accurate diagnosis or proper treatment; there is normally no incentive to fabricate." Id. at 575-76 (quotation omitted).

There are three areas of inquiry for a court in determining the admissibility of evidence under Rule 80364): the declarant's intent; the subject matter of the statements; and whether there are circumstances indicating the trustworthiness of the statements. State v. Roberts, 136 N.H. 731,740 (1993).

Dr. Fieseher testified, among other things, to the following. He was Vicki Bader's personal and family physician from July 1992 through August 1996. Vicki Bader was in relatively good health until October 1993, when she began to suffer from a variety of medical problems, including stomach pain, headaches, difficulty sleeping, elevated blood pressure and weight gain. Over the course of his first three years as Vicki Bader's physician, Dr. Fieseher treated her during eighteen office visits and four hospitalizations. Three of those hospitalizations resulted from suicide attempts, the first by drug overdose in January 1995. While hospitalized, Vicki Bader told Dr. Fieseher that the breakdown in her health was caused by her battle with the defendant over the custody of their three children. The custody dispute with the defendant included daily harassing telephone calls from him, which caused overeating, difficulty in sleeping and an extreme loss of self- esteem; the dispute had a "direct effect on her health." Dr. Fieseher treated Vicki Bader after two subsequent suicide attempts in March 1995 and June 1995.

"A court must find first that the declarant intended to make the statements to obtain a medical diagnosis or treatment. This finding may be based upon circumstantial evidence." Id. (citation omitted). The statements at issue were made during an office visit in July 1995. Dr. Fieseher testified

that he saw Vicki Bader at that time for her first physical in her three years as his patient, as she was "interested in her health" and "interested in what she could do to get her blood pressure under control." "[O]ne can infer that a person who voluntarily visits a doctor intends to obtain medical attention ..." Id. at 741. Dr. Fieseher ordered exercise and proper diet in response to her conditions. He further testified that "[Vicki Bader] told [him] that the reason she was so heavy, or one of the reasons that she was so heavy, was the fact that it would make her body more difficult to move once she was killed." He also testified that her overeating was the manner in which "she dealt with depression, it was the way she dealt with stress." Between the July 1995 office visit and August 1996, Vicki Bader had five more office visits, three of which were for "normal checkups." Dr. Fieseher testified that her condition began to improve, that she began to lose weight in August 1996, and that she was "more self- assured than [he'd] seen her in about three years." We conclude that the trial court did not err in inferring from all the relevant facts that Vicki Bader intended to make the statements at issue in order to obtain medical diagnosis and treatment.

"To be admissible, the statements must describe medical history, or symptoms, pain, sensations, or their cause or source to an extent reasonably pertinent to diagnosis or treatment. I t Id. (quotation omitted). Based upon Dr. Fieseher's testimony, we conclude that the trial court could find that the statements at issue described a cause or source for Vicki Bader's overeating and weight gain.

The final test regarding the statements' admission under Rule 803(4) is whether circumstances indicate that the statements are trustworthy. Id. at 737. "We have held that statements made to a physician are trustworthy, in part, because of the duration of the relationship between the doctor and patient." State v. White, 145 N.H. 544, 556 (2000), cert. denied, 533 U.S. 932 (2001). Dr. Fieseher had been Vicki Bader's personal and family physician for three full years when she made the statements at issue. Over that time, he

had treated her during eighteen office visits and four hospitalizations, three of which followed suicide attempts. "The guarantee of trustworthiness is that no one would willingly risk medical injury from improper treatment by withholding necessary data or furnishing false data to the physician who would determine the course of treatment on the basis of that data." Soldi, 145 N.H. at 577 (quotation omitted). We conclude there were adequate circumstances indicating the trustworthiness of the statements at issue and that the trial court's admission of the statements under Rule 803(4) was not an unsustainable exercise of discretion.

The defendant argues that the trial court erred in admitting Vicki Bader's statements because: 1) she was refusing treatment for her obesity; 2) her statements were offered to prove that the defendant had formed the intent to kill his wife; 3) "accusations of personal fault" do not fall within the medical diagnosis exception to the rule against hearsay; and 4) her accusations against him were not based upon her personal knowledge and were "purporting to predict the future" in violation of New Hampshire Rules of Evidence 602 and 70 1. We find no merit in these arguments. Our review of Dr. Fieseher's testimony reveals no evidence that Vicki Bader refused treatment for her obesity. Rather, his testimony was clear that Vicki Bader indicated a "resistance to losing weight" prior to the July 1995 office visit, but that she came to the office visit "interested in her health" and "interested in what she could do to get her blood pressure under control." In response, Dr. Fieseher advised her that exercise and proper diet were the two best things she could do to keep her weight, blood pressure, headaches and insomnia under control. He also testified that when he last saw her in August 1996, subsequent to his orders for exercise and proper diet, Vicki Bader was "in control," "more self-assured" and had started to lose weight. The defendant's second, third and fourth arguments concerning her "accusations" ignore the fact that the trial court struck the references to the defendant from Dr.

Fieseher's testimony concerning Vicki Bader's weight gain and twice instructed the jury to disregard the same.

At oral argument, the defendant argued that the admission of Dr. Fieseher's testimony was "clearly prejudicial." The State countered that the defendant had failed to raise an argument based upon unfair prejudice or New Hampshire Rule of Evidence 403 prior to oral argument. We agree. The defendant failed to raise this argument either at trial, in his motion for a new trial, or in his brief Accordingly, we decline to address it. See State v. Scovill, 144 N.H. 409,414 (1999).

We next turn to the defendant's claim that the admission of Dr. Fieseher's testimony violated his rights under the Confrontation Clause of the Sixth Amendment. When deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, appellate courts review the presence or absence of historical facts for clear error and independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause. Lilly v. Virginia, 527 U.S. 1 16, 136- 37 (1999).

The United States Supreme Court has set forth a general approach for determining whether statements properly admitted under an exception to the hearsay rule also meet the requirements of the Sixth Amendment Confrontation Clause. The "statement is admissible only if it bears adequate indicia of reliability. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Idaho v. Wright, 497 U.S. 805, 814-15 (1990) (quotations omitted; emphasis added); see State v. Cook, 135 N.H. 655, 667-68 (1992) (Thayer, J., concurring specially). The Court has held that the medical diagnosis or treatment exception is a firmly rooted hearsay exception. White v. Illinois, 502 U.S. 346,355 n. 8 (1992); see United States v. George, 960 F.2d 97, 99 (9th Cir. 1992). Consequently, because the statements were properly admitted under a firmly rooted hearsay exception, adequate indicia of reliability were present and their admission did not violate the defendant's rights under the Confrontation Clause of the Sixth Amendment.

IV. Alleged Intra-Jury Misconduct

On the morning of the third day of jury deliberations, two court bailiffs reported to the trial judge that two jurors had approached them and asked to see the judge. The judge held a chambers conference with counsel, where the bailiffs reported that the jurors were "extremely upset and almost to the point of tears." The jurors had complained that the jury foreperson was not submitting questions they desired answered to the court. During the chambers conference, a question was received from the jury asking, "[If we have reached a unanimous verdict on one of the two charges, do we need to inform you of that fact, or do we wait until we have a decision on both charges?" The defendant asked the court to interview the two jurors to determine "what compelled them to seek the court's assistance and what questions they had that were not answered" and moved for a mistrial. The State objected to both the motion for mistrial and the individual voir dire, arguing that there had been no showing of prejudice to justify a mistrial and that, given the circumstances, voir dire would impermissibly invade the deliberative process of the jury. The court denied the motion for a mistrial and declined to speak directly with the two jurors. Instead, the judge sent a note to the jury instructing it to continue its deliberations until both verdicts had been determined, and that "if any of the jurors have any other questions, please make certain that they are sent to me for response."

The following afternoon, the jury returned unanimous guilty verdicts against the defendant on both charges. At the defendant's request, the jurors were polled individually; they confirmed the unanimous guilty verdicts. After the jury returned to the deliberation room, the defendant again moved for individual voir dire of the two jurors who had earlier complained that the jury foreperson was not bringing their questions to the court's attention. Defendant's counsel represented that one of the two jurors in question "was in

tears" while leaving the courtroom. The trial court denied the motion.

In its March 2001 order denying the defendant's motion for a new trial, the trial court stated it was satisfied that any concerns regarding jurors' questions not being relayed to the court were "alleviated" by the court's supplemental answer to the jury's question during the trial. Because the jury submitted no further questions, there was no evidence of prejudice, and individual polling confirmed the jury's unanimous verdicts, the trial court found that the foreperson's conduct did not prejudice the deliberations. Consequently, the court found that the defendant's allegations of juror misconduct did not warrant voir dire during the trial.

On appeal, the defendant contends the trial court's failure to conduct voir dire of the two jurors violated his right to be tried by a fair and impartial jury under Part I, Article 15 of the State Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. We first address the defendant's claims under the State Constitution. See Ball, 124 N.H. at 23 1.

"It is axiomatic that a defendant has a right to be tried by a fair and impartial jury. It Bathalon, 146 N.H. at 487. At oral argument, the defendant proffered that State v. Rideout, 143 N.H. 363 (1999), should apply in reviewing the trial court's actions. We disagree. Rideout dealt with the trial court's role in investigating "a colorable claim that a jury may be biased or tainted by extrinsic contact or communication." Id. at 365. When such a colorable claim is made, the court "must undertake an adequate inquiry to determine whether the alleged incident occurred and, if so, whether it was prejudicial. " Id.; cf. United States v. Gaston-Brito, 64 F.3d 11, 12 (1st Cir. 1995) ("[W]hen a nonfrivolous suggestion is made that a jury may be biased or tainted by some incident, the [trial] court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial."). In Gaston-Brito, the court dealt with a claim that the jurors were prejudiced by an extrinsic non-

verbal communication at trial between a witness and a law enforcement agent sitting at the prosecution table. The defendant has made no claim of extrinsic contact or communication in this case.

Instead, the defendant has alleged that intra-jury misconduct prejudiced his right to a fair trial. As such, the defendant has the burden of proving actual prejudice. See Bathalon, 146 N.H. at 488. Under the facts of this case, the defendant has failed to meet this burden. Absent proof of actual prejudice, it was within the trial court's discretion to determine the nature and extent of its inquiry into the situation. See id.; Gaston-Brito, 64 F.3d at 12. We review that fact-specific determination for an unsustainable exercise of discretion. See Bathalon, 146 N.H. at 488; Gaston-Brito, 64 F.3d at 13; Lambed, 147 N.H. at 296 (explaining unsustainable exercise of discretion standard).

In order to address the possibility of juror misconduct, the trial judge unambiguously instructed the jury to forward to him any questions any of the jurors might have for a response. "[O]ur system of justice is premised upon the belief that jurors will follow the court's instructions." State v. Smart, 136 N.H. 639,658, cert. denied, 510 U.S. 917 (1993). Although the bailiffs reported that two jurors complained that the jury foreperson was not submitting their questions to the court, a question from the jury was received less than one hour later. There were no subsequent communications reported from the two jurors. After the verdicts were announced, the court polled the jurors individually, as an additional safeguard. Each juror confirmed the unanimous guilty verdicts and gave no indication of juror misconduct. See People v. Goode, 707 N.Y.S.2d 3 , 4 (App.Div. 2000) (defendant's motion to set aside the verdict, alleging juror misconduct, was properly denied, without hearing, especially where juror, who complained of coercion by other jurors, confirmed her verdict upon polling of the jury); United States v. Camacho, 865 F. Supp. 1527, 1536 (S.D.Fla. 1994) (polling all the jurors specifically and individually reinforces the message of unanimity in the jury's

decision as building from each juror's individual decision as to the defendant's guilt or innocence); cf. United States v. Paniagua-Ramos, 135 F.3d 193, 199 (1st Cir. 1998) ("Polling is useful to indicate an irregularity in a verdict. However, the failure of a poll to indicate coercion is not conclusive as to whether coercion actually existed." (citations omitted)).

Based upon our review of the process followed by the trial court and its findings, we cannot conclude that the trial court's inquiry into the alleged juror misconduct, including the decision not to conduct individual juror voir dire, was an unsustainable exercise of discretion. See State v. Smith, 123 N.H. 46, 50 (1983) ("A trial judge has broad discretion in deciding whether to voir dire the jury on a given subject."); Smart, 136 N.H. at 659 ("The decision to voir dire or poll the jury after its verdict is within the discretion of the trial court."). Accordingly, we find no violation of the defendant's right to be tried by a fair and impartial jury under the New Hampshire Constitution.

We next address the defendant's claims under the Federal Constitution.

When a colorable claim of jury misconduct surfaces, the [trial} court has broad discretion to determine the type of investigation which must be mounted. The trial judge may, but need not, convene a fullblown evidentiary hearing. Rather, his primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial.

... So long as the [trial] judge erects, and employs, a suitable framework for investigating the allegation and gauging its effects, and thereafter spells out his findings with adequate specificity to permit informed appellate review, his determination that the jury has not been soured deserves great respect and should not be disturbed in the absence of a patent abuse of discretion.

United States v. Boylan, 898 F.2d 230,258 (1st Cir.) (citations, quotation, brackets and ellipsis omitted), cert. denied,

498 U.S. 849 (1990); cf. United States v. Cruz, 156 F.3d 22, 28 (1st Cir. 1998) ("non-frivolous" suggestion of jury bias or taint), cert. denied, 526 U.S. 1124 (1999); Gaston-Brito, 64 F.3d at 12-13.

After completing the procedures detailed above, Judge Murphy found that the foreperson's alleged misconduct "did not prejudice the deliberations." Even if, in fact, the foreperson had refused to submit individual juror's questions to the court, we cannot say it would have been an abuse of discretion for the trial court to decide not to conduct individual juror voir dire. See Camacho, 865 F. Supp. at 1533 (affidavits of two jurors reporting that the foreperson refused to submit jurors' messages to the court not a basis for granting juror interviews). Consequently, we find no violation of the defendant's right to be tried by a fair and impartial jury under the United States Constitution.

V. Newly Discovered Evidence

The State's indictments alleged that the defendant murdered his former wife as part of a conspiracy consisting of the defendant; Mary Jean Martin, his former fiancée; Joseph Bader, his son; and Sandro Stuto, an associate of Martin. During the trial, Stuto testified that he was present, in the role of backup shooter, when the defendant murdered Vicki Bader. He also testified that he disposed of her motor vehicle after the murder and that Martin paid him approximately $6,000 to commit these acts. M e r the defendant was convicted, he learned that Stuto had allegedly recanted his trial testimony to a fellow prison inmate, referred to as "John Doe" (Doe). In filing his motion for a new trial, the defendant included an affidavit from Doe, detailing several conversations between Doe and Stuto regarding the defendant, Vicki Bader and Martin.

Specifically, Doe's affidavit stated that Stuto had told him that he was working with Martin, who was attempting to swindle funds from the defendant; that Martin pretended to be the defendant's girlfriend for the purpose of obtaining

money and housing; that Martin intended to marry the defendant in order to get his money; and that Martin was very upset that the defendant was paying support to his former wife. According to Doe's affidavit, Stuto also said he had been enlisted by Martin to assist her in obtaining money from the defendant and that Martin was attempting to defraud relatives of the defendant. Finally, the Doe affidavit stated, "Mr. Stuto further informed me that Mary Jean Martin enlisted his assistance to kill Vicki Bader and that Seth Bader did not have anything to do with killing his ex-wife."

In its March 2001 order denying the defendant's motion for a new trial, the trial court found the "allegedly newly discovered evidence," that Stuto had testified falsely at trial, would be admissible only to impeach Stuto's previous testimony. Further, the trial court found the evidence to be cumulative of other evidence already presented by the defendant in support of his theory that Martin had planned Vicki Bader's murder, and ['not of such a character that it would likely produce a different result at trial." Citing State v. Kelly, 120 N.H. 904 (1980), and RSA 526:1, the trial court ruled "that there was no miscarriage of justice at the original trial and the alleged newly discovered evidence does not justify a new trial."

On appeal, the defendant contends the trial court erred in failing to grant his motion for a new trial in the face of the newly discovered evidence of Stuto's recantation. The defendant also contends that the trial court's failure to conduct an evidentiary hearing in light of the newly discovered evidence, or to grant his motion for a new trial if a different verdict "might" result, violated his right to due process under the Federal Constitution. In order to prevail on a motion for a new trial on the ground of newly discovered evidence, the defendant must show that: 1) he was not at fault for not discovering the evidence at the former trial; 2) the evidence is admissible, material to the merits and not cumulative; and 3) the evidence is of such a character that a different result will probably be reached upon another trial. State v. Mills, 136

N.H. 46, 51 (1992); see Kelly, 120 N.H. at 906. "Recanted testimony is a species of newly discovered evidence for purposes of a new trial motion." Mills, 136 N.H. at 51; cf. United States v. Natanel, 938 F.2d 302, 313 (1st Cir. 1991) ("Evaluating such a motion calls into play the presider's sense of the ebb and flow of the recently concluded trial. For that reason, the [trial] court must be given wide rein to assess the evidence and judge the credibility of witnesses. Its decision will not be overturned on appeal except for a manifest abuse of discretion."), cert. denied, 502 U.S. 1079 (1992).

With regard to the first prong of the test, the defendant's lack of fault for not discovering the evidence at his trial in 1998 is not at issue, as the John Doe affidavit did not exist until August 1999. With regard to the second prong, the trial court found that evidence of Stuto's recantation to a fellow inmate would be admissible only to impeach Stuto's previous testimony, and was cumulative of other evidence already presented in support of the defendant's theory that Martin had planned Vicki Bader's murder.

"Cumulative evidence is defined as additional evidence of the same kind to the same point. Evidence which goes to a point upon which no evidence was adduced at the former trial is not cumulative." State v. Davis, 143 N.H. 8, 12 (1998) (quotation omitted). With regard to all of the substantive statements in the John Doe affidavit, with the exception of the single statement that "Seth Bader did not have anything to do with killing his ex- wife," we agree they are consistent with the trial testimony of Stuto and other witnesses. As such, the statements are cumulative of other evidence presented at trial and support the defendant's theory that Martin had planned Vicki Bader's murder. Accordingly, we need not address the defendant's arguments regarding the admissibility of the statements. Even if we assume that the statements were admissible, the cumulative nature of the statements dictates that the defendant has failed to meet the second prong of the newly discovered evidence test with regard to them.

With regard to the critical substantive statement in the John Doe affidavit, that "Seth Bader did not have anything to do with killing his ex-wife," we turn our attention to the third prong of the test to determine if the defendant has shown that the newly discovered evidence is of such a character that a different result would probably be reached in another trial. The defendant contends that his convictions were built on the testimony of his "two alleged accomplices," Sandro Stuto and Joseph Bader. The defendant further contends that the John Doe affidavit, detailing Stuto's alleged recantation of his trial testimony, is evidence of Stuto's perjury at trial, that Stuto's perjury dictates that Joseph Bader's testimony was perjured, and that he is, therefore, actually innocent. We disagree.

"It is a question of fact for the trial court as to whether newly discovered evidence suggesting perjury by a prosecution witness demands a new trial. Where the overriding question is the possible impact of newly discovered evidence on the credibility of a key prosecution witness, we must affirm the findings of the trial court so long as there is evidence to support them." State v. Williams, 142 N.H. 662,668-69 (1998) (citation, quotation and brackets omitted). Here, the trial court found that the evidence, which the defendant sought to introduce through the John Doe affidavit, was "not of such a character that it would likely produce a different result at trial." The John Doe affidavit, from an anonymous convicted felon at the State Prison, contains eight substantive statements, seven of which are consistent with the trial testimony of Stuto and other witnesses. Although the eighth statement (that Stuto informed John Doe that the defendant had nothing to do with killing Vicki Bader) is not consistent with the trial testimony, the trial judge heard the testimony of Stuto and Joseph Bader, both of whom testified that the defendant shot and killed Vicki Bader, and had the opportunity to evaluate the credibility of both over the collective eight days of their testimony. Cf. Mills, 136 N.H. at 5 1 ("When the purported new evidence is a recantation by a prosecution witness, the third prong of this test will not be met if the trial

judge finds as a threshold matter that the recantation is not credible."); Natanel, 938 F.2d at 3 14 ("For newly discovered evidence to warrant a retrial in a criminal case, the existence of the required probability of reversal must be gauged by an objectively reasonable appraisal of the record as a whole, not on the basis of wishfit1 thinking, rank conjecture, or unsupportable surmise."). Accordingly, we cannot say that the trial court erred in its finding that the statement of John Doe was not of such a character that it would likely produce a different result at trial.

As the defendant has failed to meet either the second or third prongs of the newly discovered evidence test with regard to all of the statements in the John Doe affidavit, we find no error in the trial court's denial of the defendant's motion for a new trial.

The defendant contends that our State cases, which hold that in order to prevail on a motion for new trial, a defendant must show that newly discovered evidence is of such a character that a different result will probably be reached upon another trial, "may no longer be good law." Citing State v. Boisvert, 1 19 N.H. 174 (1979), as one of these "older" cases, the defendant notes that Boisvert cites to United States v. Strauss, 443 F.2d 986 (1st Cir.), cert. denied, 404 U.S. 851 (1971), and contends that Strauss suggests a different test - that of the "possibility of a different verdict" - is the appropriate test if the "newly discovered evidence of perjury applied to a material issue." We disagree. Although Boisvert does cite to Strauss, it is not in support of a "possibility" test. See Boisvert, 119 N.H. at 176-77. More important, Strauss simply notes the two different standards and recognizes that the circuit courts are divided in applying the two different tests. Strauss, 443 F.2d at 989 & n. 3.

We turn our attention to the defendant's federal due process claim and assume, without deciding, that he has preserved the claim. Nonetheless, we find no merit in his claim. The defendant cobbles his due process argument together from his reading of Napue v. Illinois, 360 U.S. 264

(1959), and Natanel. He correctly cites Napue for the proposition that federal due process is violated if a State knowingly uses false evidence, including false testimony, to obtain a tainted conviction, regardless that the false testimony goes only to the credibility of the witness. Id. at 269. The defendant then cites State v. Yates, 137 N.H. 495 (1993), as this State's "progeny" of Napue. Yates does recognize Napue as the relevant law governing that case, id. at 498, but we concur with Judge Murphy that the defendant's reliance upon Yates is "misplaced," as "[t]hat case provides that a new trial is warranted where the prosecution knowingly presented false or perjured testimony. There is no basis for such a conclusion in this case." The defendant then contends that "perjury recanted after trial triggers the same due process issue as perjury discovered during trial," citing Natanel as one in 'la line of cases that expressly or implicitly apply the Napue doctrine to the situation where perjury becomes apparent after a verdict." The defendant states that Natanel held that a new trial is required if newly discovered impeachment evidence tends to show perjury by a prosecution witness which "might have affected the verdict," a less stringent test than the "would have affected verdict" test for other types of newly discovered evidence. He acknowledges that Natanel does not mention "constitutional due process," but argues that "Natanel should be viewed in the light of parallel cases elsewhere that do hold post-verdict discovery of prosecution witness perjury to be a due process issue." We decline the defendant's invitation as we disagree with his reading of both Natanel and the "parallel cases" cited.

We agree that Natanel does not address due process. Rather, it deals with the proper standard for granting or denying a motion for new trial based upon newly discovered evidence. Indeed, Natanel confirms that the proper standard for the final prong of the test is that the newly discovered evidence "will probably result in an acquittal upon retrial of the defendant." Natanel, 938 F.2d at 313 (quotation omitted). The First Circuit observed that only in cases where newly

discovered evidence is offered to impeach the credibility of a witness, and when the trial court is satisfied that the defendant has shown the testimony was "deliberately false," should the trial court apply the less stringent standard of whether "without the false testimony the jury might have reached a different conclusion." Id. (quotation omitted).

With regard to the "parallel cases" cited by the defendant in support of his due process argument, all are readily distinguishable from the instant case. In Lewis v. Erickson, 946 F.2d 1361 (8th Cir. 1991), "the outcome of the trial depended almost entirely on whether the jury believed the victim's or [the defendant's] testimony." Id. at 1362. Given the victim's recantation of her identification testimony, the Eighth Circuit remanded the case to the trial court with directions to grant a writ of habeas corpus. Id. at 1362-63. In the case at hand, however, the defendant did not testify in his own defense. Even if Stuto's entire testimony were disregarded, the jury would still have the testimony of Joseph Bader that the defendant had shot and killed Vicki Bader to consider. Lewis also recognized the "probably produce an acquittal on retrial" standard. Id. at 1342. In Cornell v. Nix, 92 1 F.2d 769 (8th Cir. 1990), the State's case rested primarily on the testimony and credibility of the defendant's two half-brothers and on the corroboration testimony of a third man. Id. at 770. When the third man recanted his corroboration testimony, but the information was not revealed to the defense at the time of the defendant's postconviction proceedings, the Eighth Circuit reversed the defendant's conviction and remanded the case for an evidentiary hearing. The court reasoned that the recantation warranted further inquiry where the testimony "was crucial to the prosecution's case, coupled with the length [twenty-one hours] of the jury deliberations followed by the Allen instruction." Id. at 771; see Allen v. United States, 164 U.S. 492, 50 1-02 (1 896) (Court approved supplemental instructions advising jurors in a deadlock to have proper deference for each other's opinions).

Cornell also recognized the "probably produce an acquittal on retrial" standard. Cornell, 921 F.2d at 771.

In Sanders v. Sullivan, 863 F.2d 21 8 (2d Cir. 1988), the defendant's conviction was predicated on the testimony of a husband and wife. After his wife died, the husband recanted his testimony and revealed the same to the then-incarcerated defendant. Id. at 2 19. In his appeal of a denial of his petition for writ of habeas corpus, the defendant asserted that the prosecutor had knowingly used false testimony to obtain his conviction. Id. The Second Circuit remanded the case to the trial court for an evidentiary hearing to determine the credibility of the recantation, id. at 227, but stated:

[W]e do not believe that due process demands a hearing to determine the credibility of every recantation of testimony. Only recantations of material testimony that would most likely affect the verdict rise to the level of a due process violation, if a state, alerted to the recantation, leaves the conviction in place.

[I]t is our belief that the perjured testimony which will trigger a due process violation must be of an extraordinary nature. It must leave the court with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.

Id. at 225-26. In addition to the "most likely" standard, Sanders also recognized the standard that "new evidence be so material that it would probably cause a result of acquittal upon retrial." Id. at 225 (quotation omitted). The court acknowledged the less stringent standard of "might alter the verdict of the jury," but limited the application of that standard to cases alleging the "prosecutor's knowing use of false testimony." Id. We reiterate our concurrence with Judge Murphy that there is no basis to conclude that the prosecution knowingly presented false or perjured testimony in this case.

In sum, we find no basis for the defendant's due process argument in the cases cited and we find no violation of the defendant's due process rights either in the trial court's decision not to hold an evidentiary hearing or in not granting

the motion for new trial on the basis of newly discovered evidence.

Affirmed.

BRODERICK, J., sat for oral argument but did not take part in the final vote; BROCK, C. J., concurred; HORTON, J., retired, specially assigned under RSA 490: 3, concurred.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 98-472, State of New Hampshire v. Seth Bader, the court on October 18, 2002, issued the following order:

Defendant's motion to reconsider is denied.

Brock, C.J., and Dalianis, J., concurred; Horton, J., retired, specially assigned under RSA 490:3, concurred.

Eileen Fox,
Clerk

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